FILED
JUN 15 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1703

ARTHUR TORTORELLO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARTHUR TORTORELLO,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York which entered a judgment of conviction against the petitioner.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at pp. 1a-35a. The opinion of the District Court is reported as *United States* v. *Tortorello* in 342 F. Supp. 1029 (S.D.N.Y. 1972). It also appears in the Appendix hereto at pp. 36a-60a.

Jurisdiction

The date of the judgment of the United States Court of Appeals for the Second Circuit was April 5, 1973, which was also the date of entry. Subsequently a timely petition for rehearing containing a suggestion that the action be reheard en banc was filed and this petition was denied in an Order dated May 17, 1973, which was also the date of entry.

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to Title 28, United States Code, Section 1254(1).

Questions Presented

1. Whether, in a federal prosecution, evidence gathered by wiretapping and bugging under a State warrant may be put in when federal officers participated in the eavesdrop and the circumstances were such that no federal warrant could have been obtained.

2. Whether wiretapping and bugging of a broadly intrusive nature, directed against the same person for a period of 322 days, and where evidence of the crimes ultimately charged did not appear until very late in the progress of the interception, is not in violation of the Fourth Amendment to the United States Constitution.

3. Whether probable cause to issue an eavesdropping warrant with respect to premises occupied by a person may properly be found in an affidavit which relies substantially on conversations to which that person was a party intercepted under an earlier eavesdropping warrant,

with respect to different premises, when that person was named in the earlier warrant as one of the parties against whom the warrant was directed but where no probable cause may have existed so to name that person.

4. Whether the former New York statute, controlling at the time of the facts in issue, which authorized wiretapping and bugging, New York Code of Criminal Procedure, Section 814 et seq., and the federal statute authorizing wiretapping and bugging, Title 18 U.S.C. Section 2516 et seq., are constitutional.

Constitutional and Statutory Provisions Involved in the Case

1. United States Constitution, Amendment IV:

   The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. New York Laws 1969, Chapter 1147, New York Code of Criminal Procedure, Sections 814-825. See, Appendix pp. 61a-76a.

3. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Sections 2516-2519. See, Appendix pp. 77a-92a.

Statement of the Case

Petitioner was indicted on an 86 count indictment for conspiracy, sale of unregistered securities, fraud in the sale of securities and mail fraud in violation of 15 U.S.C., Sections 77e(a), 77q(a), 77x, 77j(b) and 78(ff) and 18 U.S.C. Sections 2 and 1341. He was tried in the Southern District of New York before the Honorable Milton Pollack and a jury and convicted on six counts of the indictment, the remaining counts not being submitted to the jury.

The bulk of the evidence against the Petitioner was derived from Court ordered bugs and wiretaps which have the following history.

On June 2, 1969, the New York County District Attorney's office obtained an eavesdropping order to intercept conversations and to tap telephones at the Rio Coin Shop in New York City, occupied by Jacob Maishlish (also known as Jack Mace). Petitioner was named in the orders as one of the persons whose conversations were sought to be intercepted. The only allegations relating to Petitioner in the affidavit applying for the Rio Coin Shop order were (a) that he had been seen on the premises frequently, (b) that he had a criminal record, and (c) that an informer had reported hearing conversations between Maishlish and the Petitioner in respect to stolen goods. But it was conceded that the informer's reliability was "unknown."

Six renewal and amendment orders were later obtained for the Rio Coin premises, in each of which Petitioner was named. The eavesdropping ended on November 22, 1969, after continuing for 173 days.

On December 9, 1969, the New York County District Attorney's office obtained an eavesdropping order to intercept conversations and to tap telephones at the office of Todd Associates, premises occupied by the Petitioner. The application was accompanied by affidavits which incorporated the earlier Rio Coin Shop orders and affidavits which, in turn, recited conversations which had been intercepted under the earlier Rio Coin Shop orders. Five renewal and extension orders were obtained for the Todd Associates premises and the eavesdrop continued for 149 days. During the eavesdropping, conversations concerning apparently fraudulent securities transactions were unexpectedly overheard. The surveillance team thereupon notified federal authorities. Representatives of the SEC and the Joint Strike Force thereupon joined the surveillance team and participated in the eavesdropping.

In the District Court, Judge Pollack deferred Petitioner's motion to suppress the intercepted conversations to a post-verdict hearing after which the motion was denied. *United States* v. *Tortorello*, 342 F. Supp. 1029 (S.D.N.Y. 1972).

On appeal to the Second Circuit Court of Appeals, the Petitioner argued, *inter alia*, (a) that the first Rio Coin order was granted without probable cause with respect to Petitioner and that all subsequent orders were therefore tainted, (b) that all the applications and the orders failed to comply with the statutory requirements as to particularity, (c) that the orders were improperly drawn and executed in that they amounted to a long drawn out roving commission to build a case against Petitioner, and (d) that the applicable State and Federal statutes are unconstitutional.

At the oral argument and by a letter later sent to the Court of Appeals, Petitioner raised the further argument that the participation of federal officers had converted the interception into a federal one in circumstances where no federal warrant could have been procured.

The appeal was heard by a panel of the Second Circuit consisting of Chief Judge Friendly and Judges Mansfield and Timbers. Judge Timbers wrote the Court of Appeals' affirming opinion which found no merit in any of the Petitioner's arguments and did not notice at all Petitioner's argument with respect to a federal interception having taken place when no federal warrant could have been procured. Petitioner pressed this argument again in a petition for rehearing or hearing en banc which was denied.

Reasons for Granting the Writ

This case presents the most compelling of reasons for granting the writ. The Court of Appeals has come to a decision which greatly enlarges the permissible scope of bugging and wiretapping and in a manner which is difficult to reconcile with decisions of this Court.

1. Federal-State Relationships in Eavesdropping.

It is conceded that federal officers participated in the eavesdrop. Authority is strong that such participation converts the search or interception into a federal one. See *Lustig* v. *United States*, 338 U.S. 74 (1949); *Byars* v. *United States*, 273 U.S. 28 (1926); *United States* v. *Birrell*, 470 F.2d 113 (2d Cir. 1972). It has further been held that, notwithstanding the validity of a state warrant under which a search is conducted, evidence so gathered may not be put

in at a federal prosecution when federal agents participated in the search, if the state warrant was not issued in compliance with applicable federal law. See *United States v. Hanson*, 469 F.2d 1375 (5th Cir. 1972); *United States* v. *Haywood*, 464 F.2d 756 (D.C. Cir. 1972); *Navarro* v. *United States*, 400 F.2d 315 (5th Cir. 1968).

But on the facts of this case the governing federal statute, 18 U.S.C. Section 2516 et seq. afforded no possibility at all of obtaining a federal warrant, since neither the offenses for which Petitioner was suspected nor the offenses for which he was indicted fall within the list of offenses for which a federal eavesdrop order may issue under 18 U.S.C. Section 2516(1). By riding upon the back of a State warrant, federal officers were thus purporting to do what the federal statute gives them no power at all to do legally. This is an open flouting of Congressional intent, the failure to correct which in the Court below constitutes the strongest reason for granting the writ.

The general principle of *Elkins* v. *United States*, 364 U.S. 206 (1960) also speaks in favor of granting the writ. To allow federal authorities to gather and offer evidence, by participating in a state investigation, when federal statutes would not have permitted a federal warrant to issue would be a revival of the rejected "silver platter" doctrine.

2. The Duration and Range of the Eavesdrop.

The decision of the Court below validates a procedure in which the State obtained licenses to carry on bugging and tapping against the Petitioner for eleven months. During this period conversations of a great range and variety were intercepted, only a minuscule fraction of which

could be thought to have any relation to the offenses for which the Petitioner was ultimately indicted. And any conversations relevant to these offenses only appeared for the first time late in the eleven month period.

Essentially the Court below has validated a process by which Government spent months of eavesdropping trying to build up a case against a suspicious person. This is a very far cry from the kind of eavesdropping which this Court indicated might possibly be permissible in its opinions in *Katz* v. *United States*, 389 U.S. 347 (1967), *Berger* v. *New York*, 388 U.S. 41 (1967), *Osborn* v. *United States*, 385 U.S. 323 (1966).

The decision of the Court below adds a dangerous and sprawling new dimension to the area of permissible electronic eavesdropping. A decision which so brashly attacks the barricades of the Fourth Amendment deserves to be brought before this Court by the allowance of the writ.

3. Probable Cause.

The allegations relating to Petitioner in the first Rio Coin affidavit, leading to the first eavesdrop order, amounted to no more than that Petitioner was known to visit premises where it was suspected that other persons might be conducting criminal activities, that Petitioner had a criminal record, and that an undisclosed informant, of unknown reliability, had given information tending to associate Petitioner with alleged crimes occurring on the premises. Given a strong showing of the informant's reliability, such a presentation might amount to probable cause. In the face of a confession that nothing is known of the informant's reliability, it cannot. See *Spinelli* v.

United States, 393 U.S. 410 (1969); *Aguilar* v. *Texas*, 378 U.S. 108 (1964).

This Court's decision in *United States* v. *Harris*, 403 U.S. 573 (1971) does not cover a case such as this where the affiant expressly disavowed any knowledge of the reliability of the informant.

The Court of Appeals in its opinion reflected on the possibility that "there may not have been probable cause to name Tortorello in the orders" (15a), but held that, even if some conversations between Petitioner and others were used to procure renewal orders and the subsequent fresh order to tap the premises of Petitioner, this was rendered innocuous by the fact that there were legitimate interceptions of conversations between Petitioner and Maishlish (Mace) the occupant of the Rio Coin premises.

This is a dangerously wrong holding for it amounts to validating two unacceptable propositions, (a) that tainted evidence may be mixed with good averments as acceptable probable cause, and (b) that Government need suffer no sanction for naming in an eavesdrop order a person with respect to whom they have no probable cause.

4. Unconstitutionality of the Statutes.

The facts of this case are a splendid illustration of how the New York State and Federal wiretap statutes have been employed by Government to reach a depth of intrusiveness and protracted duration in wiretapping which the lower Courts have reconciled with the Fourth Amendment and the decisions of this Court only by the most tortured reasoning. In an area of such extraordinary sensitivity, going to the very heart of the Fourth Amendment and any

concept of privacy, the time is ripe for this Court to review these statutes with an eye to determining whether they are constitutional on their face and what understandings and interpretations may be necessary if they are to escape a judgment of unconstitutionality.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion in the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 365—September Term, 1972.

(Argued November 10, 1972 Decided April 5, 1973.)

Docket No. 72-1957

UNITED STATES OF AMERICA,

Appellee,

v.

ARTHUR TORTORELLO,

Appellant.

Before:

FRIENDLY, *Chief Judge,*
MANSFIELD and TIMBERS, *Circuit Judges.*

Appeal from judgment of conviction after jury trial in the Southern District of New York, Milton Pollack, *District Judge*, finding appellant guilty of selling unregistered securities, of violating the antifraud provisions of the federal securities laws, of mail fraud, and of conspiracy, the chief questions on appeal relating to evidence obtained by electronic surveillance pursuant to the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq. (1970), and the propriety of the district court's denial of appellant's motion to suppress such evidence after a post-verdict hearing. 342 F.Supp. 1029 (S.D.N.Y. 1972).

Affirmed.

GRAHAM HUGHES, New York, N.Y. (Nancy Rosner, Elliott A. Taikeff, and Rosner & Rosner, New York, N.Y., on the brief), *for Appellant.*

PATRICK T. BURKE, Special Atty., Dept. of Justice, Wash., D.C. (Whitney North Seymour, Jr., U.S. Atty., and John W. Nields, Jr., Asst. U. S. Atty., New York, N.Y., on the brief), *for Appellee.*

TIMBERS, *Circuit Judge:*

Appellant Arthur Tortorello appeals from a judgment of conviction entered upon a jury verdict returned November 12, 1971 after a ten day trial before Milton Pollack, *District Judge*, in the Southern District of New York finding Tortorello guilty on two counts of sale of unregistered securities, in violation of Section 5 of the Securities Act of 1933, 15 U.S.C. §77e(a)(1) and (2) (1970); on two counts of violation of the antifraud provisions of Section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a) (1970); on one count of mail fraud, in violation of 18 U.S.C. §1341 (1970); and on one count of conspiracy to sell unregistered securities, to violate the antifraud provisions of the federal securities laws and to violate the mail fraud statute, in violation of 18 U.S.C. §371 (1970).[1]

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1 The indictment, returned October 27, 1970, originally contained 86 counts. It charged appellant Tortorello and eight other defendants—Fred Hesse, Milton H. Peters, Arnold McKinney, John Dennett, Louis Kaye, Jerry Fields, Edward Zuber and Underwriters Investment Company—with the same categories of offenses as stated above. Tortorello and his codefendants herein also were indicted by a New York County Grand Jury on September 30, 1970 for grand larceny based on the fraudulent scheme involved in the federal prosecution.

Prior to the instant trial, on the government's motion, the cases of all defendants except Tortorello and Dennett were severed, as likewise were 80 of the 86 counts.

The chief issue on appeal is whether the trial judge erred in denying after a post-verdict hearing, 342 F.Supp. 1029 (S.D.N.Y. 1972), Tortorello's motion to suppress certain evidence obtained by electronic surveillance pursuant to the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq. (1970). Other subordinate claims of error are raised by Tortorello.

We affirm.

I.

The Fraudulent Scheme

In view of the chief issue raised on appeal, a summary description of the fraudulent scheme and conduct for which Tortorello was convicted will suffice. Essentially the evidence established that Tortorello participated in a complicated scheme to resurrect a defunct Texas corporation, Underwriters Investment Company (UIC), to recapitalize the company so that millions of new UIC shares were authorized, to cause the company to acquire assets with apparent but no real value, and to cause the company to dispose of thousands of unregistered, worthless UIC shares to the public.

Tortorello's participation in the scheme was limited to distributing the almost worthless UIC shares. He and an associate, Fred Hesse, were provided by the principals of

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The trial of defendants Tortorello and Dennett on the remaining six counts of the indictment (Counts 1, 11, 15, 49, 52 and 81) began on November 1, 1971. The jury returned a verdict finding both defendants guilty on each of the six counts on November 12, 1971.

On June 16, 1972, Judge Pollack sentenced appellant Tortorello to concurrent five year terms of imprisonment on each of the six counts and fined him a total of $10,000. He has been enlarged on bail pending this appeal.

We have not been informed as to what sentence was imposed on defendant Dennett, although we are told he has appealed from his conviction. Nor have we been informed as to the status of the cases against the seven defendants other than Tortorello and Dennett.

UIC, Peters and McKinney, with blank UIC stock certificates. They used several nominees to pledge these worthless securities as collateral for loans from various banks. This tactic proved largely unsuccessful. They then arranged for the nominees to sell the securities to various brokerage houses by deceptively creating a demand for the securities.

There was a great deal of evidence adduced at the ten day trial which established Tortorello's role in the fraudulent scheme. The evidence of course must be viewed in the light most favorable to the government at this stage of the case. *United States* v. *D'Avanzo*, 443 F.2d 1224, 1225 (2 Cir.), *cert. denied*, 404 U.S. 850 (1971). With the exception of his claim regarding an asserted defense of good faith, Tortorello does not challenge the sufficiency of the evidence.

Tortorello's involvement in the scheme eventually was discovered through the interception of wire and oral communications, to which we now turn.

II.

The Electronic Surveillance

The sequence of events with respect to the electronic surveillance here involved may be briefly summarized.

On June 2, 1969, an application was made by the New York County District Attorney's office to Justice Schweitzer in the New York County Supreme Court for an eavesdropping order to intercept conversations and to tap telephone lines at the offices of the Rio Coin Corporation (hereinafter the "Rio Coin Shop") and of Jacob Maishlish (also known as Jack Mace), both located at 1147 Avenue of the Americas, New York City. The application was based on information that Mace might be dealing in stolen property and forged instruments. An order was

granted on June 2 authorizing eavesdropping at the Rio Coin Shop premises. Upon application by the District Attorney, six renewal and extension orders subsequently were granted for the same premises. Tortorello was named in the applications and orders as one of the persons whose conversations were to be intercepted. The eavesdropping ended on November 22. It had continued for 173 days.

On December 9, 1969, the New York County District Attorney's office applied to Justice Schweitzer for an order permitting the police to tap two telephones at Todd Associates (one of the "Todd Associates" being described as "Arthur Tortorello, also known as Artie Todd"), 120 West 44th Street, New York City, and to place an overhearing device on the premises. The application was supported by an affidavit of Lawrence Hochheiser, an Assistant District Attorney, which incorporated by reference the earlier Mace applications and orders, described incriminating conversations which had been intercepted at the Rio Coin Shop, and contained other information which had been obtained by law enforcement officers through other investigative means. Pursuant to this application, an order was granted on December 10 authorizing officers to seek evidence of the crimes of Burglary, Forgery as a felony, Possession of Forged Instruments as a felony, Possession of Forgery Devices, Grand Larceny in the First Degree, Criminal Possession of Stolen Property in the First Degree and Conspiracy to commit such crimes. These crimes were more particularly identified in the supporting affidavit which was incorporated by reference in the order. Upon application by the District Attorney, five renewal and extension orders were obtained for the same premises. Each successive affidavit described the progress of the investigation. Conversations concerning fraudulent securities transactions unexpectedly were disclosed by the surveillance. The surveillance team thereupon notified federal authorities. Repre-

sentatives of the SEC and the Joint Strike Force joined the surveillance team. This eavesdropping and wiretapping ended on May 8, 1970. It had been in operation for 149 days.

A substantial portion of the evidence against Tortorello at the trial of the instant case in the district court resulted from this eavesdropping and wiretapping.[2] Tortorello moved to suppress such evidence, claiming that the orders were improperly applied for, granted, renewed, and executed. After a post-verdict hearing, Judge Pollack filed a detailed, well reasoned opinion on May 18, 1972 denying the motion. *United States* v. *Tortorello,* 342 F.Supp. 1029 (S.D.N.Y. 1972).

III.

Constitutionality of Title III

Tortorello contends that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq. (1970) (the Act), is unconstitutional on its face.

This claim was not brought to the attention of the trial court. We nevertheless shall consider the constitutional issue raised since it affects "substantial rights". Fed. R. Crim. P. 52.

Those portions of Title III which are germane to this appeal may be briefly summarized. The Act defines the circumstances under which interception of wire or oral communications[3] may be authorized by a state. Section 2516(2) provides that, upon application by the "principal prosecuting attorney" of a state or a political subdivision

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2 Several witnesses other than the surveillance officers also testified against Tortorello, but they merely repeated conversations which had been obtained pursuant to the eavesdropping and wiretapping. The district court concluded that "if the eavesdrop evidence was illegally obtained, the verdicts must be set aside." 342 F.Supp. at 1032.

3 Referred to in this opinion colloquially as "wiretaps" or "eavesdrops".

thereof, a state judge "may grant in conformity with section 2518 of this chapter and with the applicable State statute" an order authorizing interception of wire or oral communications to obtain evidence of certain enumerated offenses.[4] Section 2516(2) requires that a state statute authorizing the interception by law enforcement officers of wire or oral communications must contain certain minimal safeguards, in conformity with Section 2518, against intrusion upon rights protected by the Fourth Amendment.

On May 26, 1969, the State of New York enacted Chapter 1147 of the Laws of 1969, effective June 26, 1969, which harmonized New York law with the Act. N.Y. Crim. Proc. Law, art. 700 (McKinney 1971). The New York statute virtually tracks the language of Title III.

The threshold question is whether Tortorello has standing to challenge the constitutionality of Title III. The wiretapping and eavesdropping orders involved in this case were applied for by a state district attorney and were issued by a state judge authorized by state law to approve the interception. The state statute clearly conforms to the Act with regard to the procedures for obtaining a valid order. If it did not, the order of course would be unlawful even though authorized by state law. But the Act itself does not authorize a state judge to issue a wiretap or eavesdrop order upon application of a state officer, nor does it require that a state enact empowering legislation.

We nevertheless conclude that Tortorello has been directly affected by Title III. Were it not for the Act, the evidence uncovered by the state's electronic surveillance would not have been admissible in the instant federal ac-

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4 The offenses specified are "murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, . . . or any conspiracy to commit any of the foregoing offenses." 18 U.S.C. §2516(2).

tion. This would have been so because of the Supreme Court's decision in *Benanti* v. *United States*, 355 U.S. 96 (1957). *Benanti* involved Section 605 of the Federal Communications Act which prohibited the interception and use of wire communications without prior authorization from the sender. The Court held that wiretap evidence obtained by state officers under sanction of state law, but in violation of Section 605, could not be used in a federal court. See *Schwartz* v. *Texas*, 344 U.S. 199 (1952). Since the evidence here was intercepted by state officers, with some participation by federal officers, it could not have been used in the district court below without the authorization provided by Title III. See Section 2517(1) and (3). We hold that Tortorello has standing to challenge the constitutionality of the Act.[4a]

The crux of Tortorello's argument challenging the constitutionality of the Act is that the procedures provided by Section 2518 for obtaining a wiretap or eavesdrop order suffer from the same constitutional infirmities as those provided for in the former New York electronic surveillance statute which was invalidated by the Supreme Court in *Berger* v. *New York*, 388 U.S. 41 (1967). Tortorello also relies on *Katz* v. *United States*, 389 U.S. 347 (1967), where another electronic surveillance was held to violate the Fourth Amendment. *Berger* and *Katz* did not hold, however, that all electronic surveillance is prohibited by the Fourth Amendment. They merely held that the wiretaps and eavesdrops involved in those cases were infected with certain faults which rendered them unconstitutional.

4a Since the procedures followed by the officers in this case were those of the state, it is the state law, and not the federal prohibition of more lenient procedures, that actually is before us. We therefore conclude that in actuality the constitutional attack is on the New York statute and we shall decide the question on that basis.

In *Berger*, the grounds upon which the statute was held unconstitutional were as follows:

(1) The statute failed to require a showing of probable cause that a particular offense had been or was being committed.

(2) The statute failed to require that a description be provided of the particular conversations or communications to be intercepted.

(3) The statute failed to require particularity as to the duration of the intrusion. The Court held that the intrusion should not be so long as to be "the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause". 388 U.S. at 59.

(4) The statute failed to require particularity as to when a surveillance should be ended after the particular conversation sought was intercepted. As to this, the Court held that discretion should not be vested in the executing officer.

(5) The statute failed to provide for either notice to the persons whose conversations were to be intercepted or a showing of special facts or exigent circumstances necessitating the withholding of notice.

388 U.S. at 58-60.

In *Katz*, where the eavesdropping officers had exercised great restraint and had limited their intrusion, the Court restated the requirements of *Berger*, but with special emphasis on the necessity for a showing of probable cause *before an independent judicial officer* who also would establish the precise limits to be observed in executing the eavesdropping order.

The Act represents an attempt by Congress to establish a limited system of electronic surveillance within the guidelines of *Berger* and *Katz*. Section 2518 obviously was drafted with these decisions in mind. We are satisfied that the Act does comply with the guidelines established by the Court in *Berger* and *Katz*. An examination of the relevant sections of the Act shows that they provide for particularity in the application and order, judicial supervision, and other protective procedures whose absence caused the Court to condemn the electronic surveillance in *Berger* and *Katz*.

Judicial supervision, emphasized in *Katz*, is guaranteed. An application for a wiretap must be made to a judge, Section 2518(1), who may require additional testimony or documentary evidence in support of the application, Section 2518(2), and who must make specific findings of probable cause before authorizing the interception. Section 2518(3).

There must be particularity in the application and order. An application must contain a "full and complete statement of the facts relied upon by the applicant to justify his belief" than an order should issue. Section 2518(1)(b). Such statement must include details of the particular offense suspected, a particular description of the facilities from which communications are to be intercepted, a particular description of the type of communications sought to be intercepted, and the identity of the person or persons suspected. Section 2518(1)(b)(i)-(iv). Section 2518(4) likewise provides that the order shall specify, among other things, all of the above details.

Tortorello argues that one deficiency in particular found in the statute involved in *Berger*—that the permissible intrusion was so long (60 days) as to amount to a series of searches—also is present in the Act here involved. We disagree. Section 2518(1)(d) requires the application to

specify the period of time for which the intercept is required; and, if necessary, facts sufficient to justify continued interception after the particularly described type of communication has been first obtained. Authorization may be no longer than necessary to achieve the objective and in no event longer than 30 days. Section 2518(5). The order must specify the time period for which the intercept is authorized and whether it will automatically terminate when the described communication is first obtained. Section 2518(4)(e). Moreover, Section 2518(5) permits an unlimited number of extensions but only upon a separate showing of probable cause for each extension; and, to obtain an extension, the application must show what has resulted thus far *or* an explanation of why there have been no results. Section 2518(1)(f). We hold that these provisions so limit the length of the intrusion as to satisfy the requirements of *Berger*.

Tortorello also contends that the Act confers unduly broad discretion on the executing officer as to when the surveillance should end—contrary to *Berger*. The provisions of the Act referred to above, however, clearly circumscribe the discretion of the officer, as required by *Berger*. In addition, Section 2518(6) empowers the issuing judge to require periodic progress reports of the surveillance so that the executing officer's discretion may be further circumscribed.

Finally, Tortorello contends that the Act does not provide an adequate mechanism for notice of the surveillance. Notice prior to electronic surveillance of course would negate its usefulness. But the Court has long been critical of secret searches. See *Gouled* v. *United States*, 255 U.S. 298, 305 (1921). Electronic surveillance cannot be justified unless other methods of investigation are not practicable. Accordingly, the Act expressly requires that the application contain a statement as to whether other investigative

procedures have been attempted or why they would be doomed to failure or would be too dangerous. Section 2518 (1)(c). Before authorizing the surveillance, the judge must determine that such other procedures have failed, or would fail if tried, or would be too dangerous. Section 2518(3)(c). Moreover, in order to minimize the secretiveness of electronic surveillance, Section 2518(8) requires the recording of all intercepted communications, the preservation of them by the authorizing judge, and notice by the judge to the persons named in the order within a reasonable time after termination of the order—in no event later than 90 days.

In light of the foregoing, we conclude that the Act has carefully provided for judicial supervision of the surveillance, particularly in the application and orders, and for limits on the duration of the intrusion—the requirements to which the Court attributed constitutional significance in *Berger* and *Katz*.

The Supreme Court has indicated that electronic surveillance is violative of the Fourth Amendment where certain safeguards are absent. It has not fully specified, however, under what circumstances a wiretap or eavesdrop is *not* objectionable. The only recent decision in which the Court explicitly approved an eavesdrop was *Osborn* v. *United States*, 385 U.S. 323 (1966).[5] There a

5 With only one exception, so far as we know, those courts which have considered the constitutionality of Title III uniformly have upheld it. *United States* v. *Cox*, 449 F.2d 679 (10 Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); *United States* v. *Focarile*, 340 F.Supp. 1033 (D.Md. 1972); *United States* v. *LaGorga*, 336 F.Supp. 190 (W.D.Pa. 1971); *United States* v. *King*, 335 F.Supp. 523 (S.D.Cal. 1971); *United States* v. *Lawson*, 334 F.Supp. 612 (E.D.Pa. 1971); *United States* v. *Becker*, 334 F.Supp. 546 (S.D.N.Y. 1971); *United States* v. *Perillo*, 333 F.Supp. 914 (D.Del. 1971); *United States* v. *Leta*, 332 F.Supp. 1357 (M.D.Pa. 1971); *United States* v. *Scott*, 331 F.Supp. 233 (D.D.C. 1971); *United States* v. *Cantor*, 328 F.Supp. 561 (E.D.Pa. 1971); *United States* v. *Sklaroff*, 323 F.Supp. 296 (S.D.Fla. 1971); *United States* v. *Escandar*,

man informed the Department of Justice that an attorney had initiated a discussion with him concerning the possibility of his approaching a juror in a pending criminal case. The informant executed a written statement under oath. The Department of Justice then obtained court approval to wire the informant for sound at his next meeting with the lawyer. When the recorder failed to operate at the first meeting, judicial approval was obtained for its use at the next meeting. One conversation was recorded and introduced as evidence. The Court held that the use of the recording device was permissible, and affirmed the conviction.

While the Act permits electronic surveillance wider in scope and longer in duration than that held constitutional in *Osborn*, it does not suffer from the infirmities that the Court found fatal to the statute in *Berger* and to the surveillance in *Katz*. We decline to add to the constitutionally imposed requirements set forth in those decisions. We therefore hold that Title III is not unconstitutional on its face.

IV.

Interception of Tortorello's Conversations at the Rio Coin Shop

Tortorello contends that the Rio Coin Shop orders were invalid because they named him as a person whose conversations were to be intercepted although the applications

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319 F.Supp. 295 (S.D.Fla. 1970). The *Scott* and *Escandar* opinions, in particular, contain well-reasoned discussions of the constitutional issue.

The only decision of which we are aware that holds the Act unconstitutional is *United States* v. *Whitaker*, 343 F.Supp. 358 (E.D.Pa. 1972), which was reversed in *United States* v. *Whitaker*, —— F.2d —— (3 Cir. Feb. 27, 1973), on the basis of the court's earlier decision upholding the constitutionality of Title III in *United States* v. *Cascro*, —— F.2d —— (3 Cir. Jan. 30, 1973).

failed to show probable cause for believing that he had committed or was about to commit a crime. No contention is made that probable cause was lacking as to Jack Mace, who also was named in the Rio Coin Shop orders as one whose conversations were to be intercepted.

The government argues that it did not have to show that Tortorello had engaged in or was about to engage in criminal activity. It maintains that as a general principle it is not required to establish probable cause as to all participants in a conversation before it can intercept a particular conversation. If there is probable cause as to one of the parties to a conversation, so the argument goes, incriminating statements made by another party to the conversation can be intercepted and used even though probable cause is not established as to him. Some courts have upheld this principle. They have held that, since the identity of all persons who may contact or be contacted by the suspect usually cannot be known, it is permissible to record pertinent conversations involving parties not named in the interception order. *United States* v. *King*, 335 F.Supp. 523, 539 (S.D. Cal. 1971); *United States* v. *Perillo*, 333 F.Supp. 914, 920-21 (D. Del. 1971); *United States* v. *Sklaroff*, 323 F.Supp. 296, 325 (S.D. Fla. 1971).

We are in general agreement with these decisions. In our view the government need not establish probable cause as to all participants in a conversation. If probable cause has been shown as to one such participant, the statements of the other participants may be intercepted if pertinent to the investigation. Clearly there was probable cause to intercept Mace's conversations. Tortorello does not contend otherwise. The government therefore was entitled to intercept the incriminating statements of Tortorello where Mace was involved in the conversations and to use such statements to support an application for electronic surveillance of Tortorello.

This determination, however, does not end our inquiry. Tortorello also was named in the Rio Coin Shop orders as a person whose conversations were to be intercepted. Certainly the interception of conversations in which Mace took part would not be rendered invalid by the fact that there may not have been probable cause to name Tortorello in the orders. But surveillance agents overheard and recorded conversations between Tortorello and third persons. These conversations along with other evidence were included in the affidavits in support of the applications for electronic surveillance of Todd Associates. It might be conceivable that, if there was no probable cause to overhear the conversations of Tortorello with third persons in executing the Rio Coin Shop orders, there was no probable cause for the Todd Associates surveillance.

We find it unnecessary, however, to decide whether there was probable cause to name Tortorello in the Rio Coin Shop orders. No testimony concerning, nor recordings obtained from, the Rio Coin Shop surveillance were introduced at trial. Moreover, conversations between Tortorello and third persons intercepted as a result of the Rio Coin Shop surveillance were not used as leads to evidence adduced at trial. The progress reports for the Rio Coin Shop surveillance set forth conversations *by Mace* with Tortorello which clearly indicated that Tortorello was involved in the handling of stolen goods. These progress reports were used to establish probable cause for the Todd Associates orders. Also used was a tape, secured through the use of a confidential informant, which revealed that Tortorello had agreed to sell the informant a stolen "piece of stock" in the amount of $10,000. It is clear that there was sufficient probable cause based upon lawfully intercepted conversations to support the issuance of the orders to intercept Tortorello's conversations at Todd Associates. Tortorello's conversations with third persons at the Rio Coin Shop or

on the Rio Coin Shop telephone were not crucial to probable cause for the Todd Associates orders.

Accordingly, we hold that there was probable cause for the Todd Associates warrants.[6]

V.

District Attorney's Failure to Appear in Person Before the Issuing Justice

Tortorello contends that the electronic surveillance orders were improperly applied for because Honorable Frank Hogan, the New York County District Attorney, did not appear in person before the issuing Justice. This contention is based upon a construction of Section 2516(2) of the Act and Section 794 (now N.Y. Crim. Pro. L. §690.35) of the New York Code of Criminal Procedure.

The relevant facts may be briefly summarized. Assistant District Attorney Hochheiser was assigned to the Rio Coin Shop and Todd Associates cases. In that capacity he supervised the investigations of Mace and Tortorello. He prepared all of the eavesdrop application papers. These papers were presented to Mr. Hogan himself who gave each application, with one exception, his personal atten-

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6 The quantum of probable cause required under Title III has been considered by a number of courts, including ours. *United States* v. *Poeta*, 455 F.2d 117, 121-22 (2 Cir.), *cert. denied*, 406 U.S. 948 (1972); *United States* v. *Klein*, 465 F.2d 187, 190-93 (8 Cir. 1972); *United States* v. *LaGorga*, 336 F.Supp. 190, 193 (W.D.Pa. 1971); *United States* v. *King*, 335 F.Supp. 523, 532-37 (S.D.Cal. 1971); *United States* v. *Becker*, 334 F.Supp. 546, 549-50 (S.D.N.Y. 1971); *United States* v. *Leta*, 332 F.Supp. 1357, 1361-62 (M.D.Pa. 1971); *United States* v. *Scott*, 331 F.Supp. 233, 242-44 (D.D.C. 1971); *United States* v. *Cantor*, 328 F.Supp. 561, 56-68 (E.D.Pa. 1971); *Dudley* v. *United States*, 320 F.Supp. 456, 458-60 (N.D.Ga. 1970); *United States* v. *Escandar*, 319 F.Supp. 295, 304 (S.D.Fla. 1970).

tion.[7] After conferring together and reviewing the application in each instance, both Mr. Hogan and Mr. Hochheiser swore to their respective affidavits before a notary public.

In each instance, Mr. Hochheiser's affidavit stated the factual basis for issuance of the interception order being applied for and the belief that the evidence sought could not be obtained except by the eavesdrops or wiretaps sought. Mr. Hogan stated in his affidavit that he had read the Hochheiser affidavit, that based on it he believed there was probable cause for the electronic surveillance sought, and that no practical alternative means of obtaining the evidence existed. Mr. Hogan was the named applicant for each of the electronic surveillance orders.

The application and supporting affidavits in each instance were submitted to Justice Schweitzer by Mr. Hochheiser who was present to answer any questions the Justice might wish to ask before deciding whether to issue the order. Mr. Hogan never appeared in person before Justice Schweitzer. Mr. Hochheiser did not swear to his affidavit a second time before the Justice.

Sections 2516(1) and (2) of the Act designate, respectively, the federal and state officials authorized to apply for eavesdrop and wiretap orders.[8] Section 2516(2) pro-

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7 The one exception was a renewal application which, in Mr. Hogan's temporary absence, was presented to the Acting District Attorney, Alfred J. Scottie, who executed the authorizing affidavit. No contention is made that this invalidated the order based on such application.

8 Tortorello argues that different procedures are called for because of language differences between Section 2516(1) and Section 2516(2) dealing, respectively, with federal and state interception orders. The requirement for federal applications is that the Attorney General "authorize" an application, while the requirement for state applications is that the "principal prosecuting attorney . . . may apply" for an order. We decline to attribute to this language difference the significance claimed by Tortorello. The purpose of both sections is the same. The report of the Senate Judiciary Committee referred to below, S. Rep. No. 1097 at p. 98, paraphrases §2516(2) in such a way as to indicate that there is no difference in substance.

vides that the state's "principal prosecuting attorney" or the "principal prosecuting attorney of any political subdivision thereof" "may apply" for an interception order. We find nothing in that provision to require the personal appearance of the "principal prosecuting attorney" before the issuing state judge.

A report of the Senate Committee on the Judiciary, which contained a comprehensive analysis of the Act, set forth the purpose of requiring that a state or local "principal prosecuting attorney" apply for the order as follows:

> "The intent of the proposed provision is to provide for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officers of the State [where state attorney general authorizes the application] . . . The intent of the proposed provision is to centralize areawide law enforcement policy in [the county district attorney]." S. Rep. No. 1097, 90th Cong., 2d Sess. 10 (1968), quoted in U.S. Code Cong. & Adm. News 2112, 2187 (1968).

It appears that this provision was designed to encourage state and local law enforcement officials—the "principal prosecuting attorneys"—to determine whether a particular proposed use of electronic surveillance would be consistent with the overall policy respecting monitoring which had been followed in the state or area. Approval by the prosecuting attorney of an application for electronic eavesdropping essentially is one of policy. As one court has put it, "the greater the degree of public responsibility attributable to the executive making the initial determination of approval, and the higher his public visibility, the greater is the likelihood that he will be called to account for errors in administration of policy and that the safeguards of the

federal statute will be effective." *United States* v. *Lanza*, 341 F.Supp. 405, 408 (M.D. Fla. 1972).

The objective of the provision can be effectively attained by having the chief prosecuting officer pass on applications which his assistants prepare and, after he has approved them, having them presented to the issuing judge. That objective will not be furthered by requiring the chief prosecuting officer to appear personally before the issuing judge. His assistants usually are in a better position to answer questions concerning probable cause, the only practical justification for requiring a personal appearance. Indeed, it would be practically impossible for a district attorney in a county as large as New York County, personally to make all the appearances that Tortorello's reading of Section 2516(2) would require. There is no support in either the language or purpose of Section 2516(2) for such requirement.

The Act of course does not preclude a state from requiring its principal prosecuting officers to appear personally before the issuing judge. Tortorello contends that New York has imposed this requirement in Section 794 (now N.Y. Crim. Pro. L. §690.35) of the New York Code of Criminal Procedure as interpreted in *People* v. *Ricken*, 29 App. Div. 2d 192, 287 N.Y.S. 2d 118 (3d Dept. 1968), *aff'd*, 27 N.Y.2d 923, 318 N.Y.S. 2d 142, 266 N.E.2d 821 (1970). Section 794 provided in relevant part:

> "The person seeking the warrant shall appear personally before the judge, justice or magistrate who may, before issuing the warrant, examine, on oath, the person seeking the warrant and any witnesses he may produce, and must take the affidavit or deposition of the person seeking the warrant."

In *Ricken*, the police officer who sought a search warrant swore to his affidavits before a notary public. Another

police officer appeared before, and presented them to, the issuing Justice. The court held that the warrant was invalid because the applicant, there the police officer apparently most knowledgeable about the factual grounds for the application, did not personally appear.

Tortorello contends that, since the applicant under Section 2516(2) is the "principal prosecuting officer", he is required by Section 794 personally to appear.[9] We disagree. The issue is not what "the attorney . . . authorized . . . to make application" means in the federal statute but what "[t]he person seeking the warrant" means in Section 794. It seems clear from the language of the New York statute and the *Ricken* decision that the purpose of requiring the appearance of the "person seeking the warrant" is to enable the court to question him as to exactly what he is seeking and why he believes that he is entitled to seek it. These questions can be answered best by the person who has had close contact with the case and whose affidavit recites facts believed to establish probable cause. He is the "person seeking the warrant". A person such as District Attorney Hogan who merely reviews the application to determine whether, as a matter of policy, the electronic surveillance should be undertaken would not be in the best position to answer such questions. We conclude that Section 794 did not require the personal appearance of Mr. Hogan before the issuing Justice.

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9 Tortorello hints that the application may have been improper under state law since the affidavits were sworn to before a notary public rather than before the issuing Justice. No authority is cited for such proposition and we know of none. The critical requirement is that the affiant with knowledge of the facts on the issue of probable cause shall appear before the issuing Justice. To require that he swear to his affidavit a second time before the Justice, would be a meaningless formality.

VI.

Particularity in the Applications and Orders

Tortorello next contends that the electronic surveillance of Todd Associates was unlawful because the applications and orders lacked sufficient particularity as to the offenses to be investigated and the communications to be intercepted.[10]

The first Todd Associates application, dated December 9, 1969, described the subject offenses as "the acquisition and distribution of stolen negotiable instruments and documents and acts or crimes in furtherance of such acquisition and distribution" (Paragraph 17). It sought to intercept conversations "relative to the commission" of these acts and crimes (Paragraph 19), which it was alleged would "constitute evidence of the crimes of Burglary, Forgery as a felony, Possession of Forged Instruments as a felony, Possession of Forgery Devices, Grand Larceny in the First Degree, Criminal Possession in the First Degree and conspiracy to commit said crimes" (Paragraph 17).

In earlier paragraphs reciting facts for the purpose of establishing probable cause, the offenses suspected and the particular conversations sought to be intercepted were more fully detailed. These facts were based on the affidavits in support of the seven Rio Coin Shop orders,[11] conversations recorded as a result of the Rio Coin Shop wiretaps and eavesdrops, and information obtained by

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10 We find it difficult to ascertain from Tortorello's brief whether both the Rio Coin Shop and Todd Associates surveillances are challenged on this ground. Although we discuss only the Todd Associates applications and orders, our conclusions with respect thereto apply also to the corresponding papers relating to the Rio Coin Shop surveillance.

11 In Paragraph 7 of the Todd Associates application, the orders and supporting affidavits pertaining to the Rio Coin Shop surveillance were incorporated by reference.

law enforcement officers through other investigative activities. They showed that Tortorello was engaging in a highly organized interstate business of receiving and distributing stolen property (Paragraph 7). His specialty appeared to be stolen securities. The affidavit alleged his association with persons known to be dealing in stolen securities and other forms of stolen property (Paragraphs 8, 10, 11, 12, 13). It detailed two specific transactions in which he personally engaged in the distribution of stolen securities (Paragraphs 10A, 14). The affidavit described a telephone call to Tortorello from a known member of the underworld in which they discussed getting together for a "deal".

Subsequent applications for renewal and extension orders followed the same basic form as the first application. The later applications added to the list of offenses the crimes of acquisition, distribution or use of counterfeit negotiable instruments and fraudulently obtained or stolen airline tickets. These offenses were added when evidence of their commission was discovered. Such evidence was set forth in the applications. Reports on the evidence produced by the electronic surveillance were included in the supporting affidavits.

The conversations to be intercepted and the offenses to which they related were not fully described within the four corners of the orders. In his first order, for example, Justice Schweitzer found that there were reasonable grounds to believe that evidence of "the crimes of Burglary, Forgery as a felony, Possession of Forged Instruments as a felony, Possession of Forgery Devices, Grand Larceny in the First Degree, Criminal Possession of Stolen Property in the First Degree, and conspiracy to commit said crimes" might be obtained by authorizing the electronic surveillance. He incorporated the supporting

affidavit in his order. He then authorized interception of communications "as described and delineated in paragraph 19 of the herein incorporated affidavit". Paragraph 19 of the affidavit, as indicated above, referred back to paragraph 17 which capsulized the suspected offenses and referred generally to the factual recitations throughout the affidavits detailing Tortorello's criminal activities. The end result was an authorization by the court to intercept wire or oral communications pertaining to the type of criminal activities extensively described in paragraphs 7, 8, 10, 11, 12, 13 and 14 of the supporting affidavit and summarized in paragraph 17. All the renewal and extension orders followed the same format.

Particularity in an eavesdrop or wiretap application and order is critical to the constitutionality of a surveillance. The Fourth Amendment does not permit law enforcement officers to engage in lengthy surveillance of a suspected, or even a known, criminal regarding his associations and areas of legal and illegal operations, in the hope of obtaining evidence of some unspecified crime. The Act prohibits such "strategic intelligence surveillance" [12] by requiring, among other measures, that the application identify the particular offense suspected and the particular conversations anticipated. Section 2518(1)(b) requires that the application set forth a full and complete statement of facts "as to the particular offense that has been, is being, or is about to be committed" and "a particular description of the type of communications sought to be intercepted". Each order authorizing an interception is required to set forth " a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates". Section 2518(4)(c).

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[12] Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of Law and Order*, 67 Mich. L. Rev. 455, 468-72 (1969).

These provision undoubtedly were prompted by the Supreme Court's decisions in *Berger* v. *New York, supra,* and *Katz* v. *United States, supra.* See S. Rep. 1097, 90th Cong., 2d Sess. 13 (1968), quoted in U.S. Code Cong. & Adm. News 2112, 2190 (1968).

A difficult question is the degree of particularity required by the Fourth Amendment and Title III. Tortorello contends that the intrusion can be no less precise and discriminate than that approved in *Osborn* v. *United States, supra.* As stated above, the Act clearly permits a surveillance broader in scope than that in *Osborn.* But the exact boundaries of a constitutionally valid electronic surveillance thus far have not been delineated.

Some guidance, however, has been provided by decisions concerning the particularity of a wiretap or eavesdrop authorized under Title III. In *United States* v. *Scott,* 331 F.Supp. 233 (D.D.C. 1971), the affidavits recited that certain known and unknown persons were involved in a "narcotics wholesale trafficking" conspiracy. Specific offenses were alleged to have been committed by certain members of the conspiracy which involved narcotics wholesaling. The type of communications sought to be intercepted were conversations between persons in certain specified cities and states which would reveal the details of a scheme to smuggle narcotics into the United States, to transport them to the Washington, D.C. area, and to distribute them there. The order found probable cause to search for evidence pertaining to "the importation and transportation of narcotics in violation of section 174 of Title 21 of the United States Code." It authorized interception of communications concerning the date and the manner in which narcotic drugs would be smuggled into the United States. The court held that the application and order satisfied the requirements of Sections 2518(1)(b) and 4(c), respectively. 331 F.Supp. at 241-42.

In *United States* v. *Mainello*, 345 F.Supp. 863 (E.D.N.Y. 1972), the applications specified that the communications sought to be intercepted concerned "offenses in violation of Article 225, Sections 225.0 through 225.40, New York State Revised Penal Law." 345 F.Supp. at 872. The orders specified that oral and wire communications pertaining to these offenses could be intercepted. As in the instant case, the conversations to be intercepted were more particularly described in the orders and applications in establishing probable cause. The court held that the particularity requirements of the Fourth Amendment and Title III had been met. Other courts have reached a similar result. See, e.g., *United States* v. *Escandar*, 319 F.Supp. 295, 302-04 (S.D. Fla. 1970); *United States* v. *Leta*, 332 F.Supp. 1357, 1359-60 (M.D.Pa. 1971); *United States* v. *King*, 335 F.Supp. 523, 537-38 (S.D. Cal. 1971).

These decisions demonstrate that a pragmatic approach has been taken with respect to the particularity requirement. A specific crime or a specific series of related crimes must be identified. Although the nature and type of the anticipated conversations must be described, the actual content need not and cannot be stated since the conversations have not yet taken place at the time the application is made and it is virtualy impossible for an applicant to predict exactly what will be said concerning a specific crime. *United States* v. *Sklaroff*, 323 F.Supp. 296, 307 (S.D.Fla. 1971). The order must be broad enough to allow interception of any statements concerning a specified pattern of crime. In determining whether the order and application are sufficiently particular, the papers as a whole must be considered, including especially those portions which recite facts intended to establish probable cause.

The district court in the instant case held that there was no substance to Tortorello's claim that the applica-

tions were not sufficiently particular. 342 F.Supp. at 1036. We have carefully reviewed all the applications. We are satisfied that none of them disclosed an improper intention on the part of the applicant to secure a roving commission. Certain paragraphs in each application succinctly stated the offenses being investigated and the communications sought. Other paragraphs, primarily addressed to probable cause, further defined the relevant criminal activity. The applications sought to intercept only those conversations relating to the pattern of criminal conduct fully described. While the descriptions of offenses were somewhat broad, they were no more so than was necessary under the circumstances. It was alleged that Tortorello had directly participated in or had had contact with a wide variety of crimes. We hold that, taken as a whole, the applications described the suspected offenses and the conversations sought to be intercepted with the degree of particularity required by the Fourth Amendment and Section 2518(1)(b).

The validity of the orders turns upon the validity of the applications. Justice Schweitzer relied upon the applications to describe with particularity the communications to be intercepted and the related offenses. It would have been better if he had stated in the orders themselves more precisely what those authorized to execute the orders were entitled to overhear and record. But he did incorporate the affidavits into the orders, and we have held that the affidavits set forth a particular description of the conversations sought to be intercepted and the offenses to which they related. The judge in effect fully approved the scope and purpose of the surveillance as delineated in the application papers. A restatement of what was contained within the application papers therefore was not essential. We hold that the orders were sufficiently particular.

VII.

Amendment of Orders

Tortorello claims that the eavesdrop and wiretap orders were invalid for failure to amend them as required by New York law to include reference to the securities fraud offenses for which he was indicted by a federal grand jury.[13] He argues that all the communications overheard, both before and after an amendment was required, should have been suppressed.

Section 2517(5) of the Act provides that unanticipated intercepted conversations may be used in a criminal proceeding:

> "when authorized or approved by a judge of competent jurisdiction where such a judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable." [14]

Section 825.4 (now N.Y. Crim. Pro. L. §700.65) of the New York Code of Criminal Procedure provided essentially the same amendment procedure to permit the use in a criminal proceeding of communications unexpectedly intercepted "when a justice amends the eavesdropping warrant to include such contents." See *People* v. *DiLorenzo*, 69 Misc. 2d 645, 651-52, 330 N.Y.S.2d 720, 724-27 (Sup. Ct. 1972). It is undisputed here that no formal hearing was held to amend the orders after the surveillance team

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13 While this claim also was not raised in the district court, we nevertheless shall consider and rule upon it, since it affects substantial rights. See Section III of this opinion, p. 2660 *supra*.

14 For a decision upholding the constitutionality of Section 2517(5), see *United States* v. *Cox*, 449 F.2d 679, 683-87 (10 Cir. 1971), *cert. denied*, 406 U.S. 934 (1972).

discovered evidence of securities fraud involving Underwriters Investment Company (UIC). The issue is whether it was enough for the law enforcement officers to inform Justice Schweitzer in the supporting affidavits for renewal and extension of the orders that they had intercepted certain conversations dealing with the fraudulent UIC scheme.

The procedure followed here may be briefly stated. Affidavits in support of each of the renewal and extension orders set forth the progress of the investigation. They included a day to day summary of the conversations overheard and events witnessed by the surveillance team. During surveillance under the second Todd Associates order, effective from January 9, 1970 to February 8, 1970, the first conversation relating to UIC was intercepted. In the very next affidavit, that which led to the February 9 order, it was indicated that these conversations had occurred. Additional information derived from the electronic surveillance concerning the UIC scheme was reported in the affidavit in support of the March 10 order. Finally, in the affidavit in support of the April 8 order, after the contours of the scheme had been discovered, all the information that had thus far been obtained was presented to the court in a detailed description of the fraudulent scheme, including in relevant part the following:

> "The conversations intercepted since February 1970 as set forth herein and in the affidavit in support of the Order of March 10, disclose that Tortorello, Hesse and their co-conspirators were planning a large-scale securities fraud involving the stock of Underwriters Investment Company. . . ."

The provisions of the orders remained basically the same after discovery of evidence pertaining to the UIC stock

fraud. They stated that there was probable cause with respect to the same types of offenses, including Grand Larceny; they incorporated by reference the supporting affidavits; and they referred to those affidavits for a more particular description of the offenses and conversations to be intercepted.

The New York statute, Section 825.4, is controlling on this issue. The legislative history of Section 2517(5) of the Act, which is substantially identical to the New York provision, furnishes some illumination as to the reasons for requiring an amendment procedure:

> "Such subsequent application would include a showing that the original order was lawfully obtained, that it was sought in good faith and not as subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order." S. Rep. 1097, 90th Cong. 2d Sess. 100 (1968), quoted in 2 U.S. Code, Cong. & Admin. News 2189 (1970).

Where the electronic surveillance is to continue, and law enforcement officers wish to intercept additional communications relating to accidentally-discovered criminal activity, the amendment procedure also provides an opportunity for the court to indicate in the renewal order that conversations relating to such criminal activity may be intercepted.

The government maintains in the instant case that, on the basis of the information set forth in the supporting affidavits, the issuing justice was able to and did in fact determine that the original application was not a subterfuge; that it was made in good faith; and that communications with respect to the UIC scheme were incidentally intercepted during the course of a lawfully executed order. It further contends that there was no need to amend the

provisions of the order, since there was no crime under state law specifically dealing with stock fraud[15] (this being encompassed by the crime of Grand Larceny[16]) and since the affidavits which were incorporated by reference in the orders clearly indicated the specific crimes to be investigated. We agree.

Neither the New York statute nor the Act requires the issuing judge to announce formally in open court that he has noticed the interception of evidence not covered by the original order and has determined that it was properly obtained. It is enough that notification of the interception of evidence not authorized by the original order be clearly provided in the renewal and amendment application papers. A judge presumably will scrutinize any application and will scrupulously impose the restrictions required by statute. The orders here, by referring to the affidavits for a description of offenses and communications to be inter-

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15 Moreover, it may be that amendment was not required by New York law under the circumstances of this case. The New York Commission on Revision of Penal Law and Criminal Code, in a memorandum to the predecessor statute, indicated the type of situation intended to be covered by the provision for amendment:

> "Section 822 relates to a situation where, in the course of executing a valid eavesdropping warrant . . ., the applicant or his designated agent unexpectedly overhears an incriminating conversation that is *totally unrelated* to the crime for which the warrant was issued." (emphasis added). McKinney's 1968 Session Laws of New York, Memorandum 2293, 2296.

The "crime for which the warrant was issued" here was the acquisition and distribution of *stolen* securities. The conversations overheard related to the acquisition and distribution of *fraudulent* securities. It might be said that the two crimes are not "totally unrelated".

16 In *United States* v. *Grant*, 462 F.2d 28 (2 Cir. 1972), we held that the definition of "larceny" in Section 155.05(2) of the New York Penal Law "was sufficiently broad to encompass" the violations of the federal securities laws involved therein. 462 F.2d at 33. We reach the same conclusion with regard to the securities frauds and registration violations involved in the instant case, which were similar in many respects to those involved in *Grant*.

cepted, were amended as the contents of the affidavits changed.

We hold that the amendment requirements under New York law were satisfied.

VIII.

Execution of Orders

Tortorello also contends that the manner in which the wiretaps and eavesdrops were executed resulted in unnecessary monitoring and recording of many irrelevant conversations in violation of the Fourth Amendment. He further contends that this violated those provisions of the orders requiring minimal interception of nonpertinent communications. Relying on *United States* v. *Scott*, 331 F.Supp. 233, 247-48 (D.D.C. 1971), he argues that all the intercepted conversations were inadmissible, even though most of them may have been properly overheard. We disagree.

Section 2518(5) of the Act, in order to prevent unnecessary intrusion into the privacy of the surveillance target, provides in relevant part that:

> "Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception. . . ."

All the Todd Associates orders included a provision in compliance with this section. The question raised here is whether the executing officers took reasonable measures to minimize the interception of irrelevant communications.

The officers charged with executing the interceptions, relying on what strikes us as good judgment, devised certain basic guidelines for determining whether a conversation should be monitored and recorded. Among the con-

siderations taken into account were the identity of the caller, the guarded nature of the conversation, and the timbre of the voice of the speaker. Children's conversations were not recorded. With regard to the subject matter of the conversations, those relating, for example, to stocks and bonds, letters of credit, buying controlling interests in corporations, and the making of loans usually were intercepted. Conversations relating to meetings, conferences, and money dealings often were recorded. As soon as it was determined that any conversation overheard was not pertinent, all interception immediately ceased. On one occasion, the officers were eavesdropping on a pertinent conversation when a non-pertinent telephone call occurred; both the eavesdrop and the wiretap were immediately shut off.

The district court examined the daily records or line sheets and heard the testimony of the detectives who monitored the Todd Associates conversations. In holding that "genuine and acceptable safeguards" were taken to minimize the interception of non-pertinent conversations, the court observed:

> "Obviously, some non-pertinent items crept in because they were recorded before a determination of their relevancy could be made. Other such items were included because they appeared in conversations also containing pertinent items. Still others represented a determination of pertinence with which the Court does not necessarily agree. However, overall, the excess items were *de minimis* and the compliance reasonably conformed to adequate rules set down for the intercept." 342 F.Supp. at 1038.

Some indication of what constitutes proper minimization measures can be gleaned from recent decisions involving a challenge to the execution of surveillance orders. In

United States v. *Scott, supra,* all conversations were overheard and recorded. After examining the surveillance team's log sheets, the court determined that only 40% of the conversations in fact were relevant, that from introductory remarks it could have been determined that many were irrelevant, and from experience with certain calls it could have been ascertained that many others were irrelevant. In short, the court found that there was no attempt by the officers to devise some means of limiting interception. It therefore suppressed the evidence obtained from all the conversations.

In *United States* v. *King,* 335 F.Supp. 523, 540-42 (S.D. Cal. 1971), every communication that came across the tapped wire was recorded, regardless of who the parties were or what they were discussing. It was estimated that ninety percent of the phone calls were monitored by the surveilling agents. The court, in rejecting the government's contention that all conversations had to be monitored in their entirety because there was a chance that something relevant might turn up, stated:

> "[I]t could satisfy itself with information received from conversations falling more easily within the classes which the statute requires to be particularly described. This means that if after a certain amount of time has elapsed a conversation still appears innocent, the Government would cease interception out of respect for the parties' constitutional rights and for the limited system which Congress so painstakingly created. An exception to this might be phone calls between known conspirators which may be intercepted in their entirety due to the strong possibility that the conversation may take a relevant turn." 335 F.Supp. at 542.

In *United States* v. *Sklaroff,* 323 F.Supp. 296, 316-17 (S.D.Fla. 1971), the court held that those responsible for

executing the orders had successfully minimized interceptions. Thirty-two calls not involving persons named in the orders were not recorded. Of nine personal calls, one was not recorded at all, two were partially recorded, and six were completely recorded. The court found that a minimal number of personal calls were intercepted. It held that on the whole the officers had acted properly in executing the orders.

It is clear from these decisions that a court should not admit evidence derived from an electronic surveillance order unless, after reviewing the monitoring log and hearing the testimony of the monitoring agents, it is left with the conviction that on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion.

We agree with the district court here that the detectives who conducted the Todd Associates surveillance established and observed reasonable guidelines in limiting their intrusion. By considering the nature of the persons conversing and the subject of the conversations, they reasonably limited interception to communications which were likely to be relevant. They also halted all interception as soon as the conversation appeared to be non-pertinent, even if it meant not hearing simultaneously a pertinent conversation.

We hold that the officers respected the privacy of the persons under surveillance and utilized effective safeguards against excessive intrusion.

IX.

Defense of Good Faith

Finally, Tortorello contends that the trial judge failed properly to instruct the jury on his defense of good faith. On the conspiracy count, the jury was charged that Tortorello could not be convicted unless "he knew what the un-

lawful purpose was" and unless he "entered into the conspiracy with the specific criminal intent . . . purposely intending to violate the law." Similarly, on the other counts, the court carefully and fully charged that Tortorello could not be found guilty unless the jury determined that he was aware of the fraudulent nature of the transactions and specifically intended to violate the law. We hold that the charge, taken as a whole, properly instructed the jury on the issue of criminal intent which was essential to his defense of good faith.

We have carefully considered Tortorello's other claims and find them to be without merit.[17]

Affirmed.

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17 Counsel for Tortorello urges, by letter addressed to the Court subsequent to the argument, that we reverse on the basis of our recent decision in *United States* v. *Birrell*, —— F.2d —— (2 Cir. 1972), slip op. 707 (December 4, 1972). In *Birrell*, we did indicate our disapproval of the practice of postponing suppression hearings until after trial, particularly where the issue is the legality of a search or seizure which does not require a preview of the government's case as in a taint hearing. —— F.2d at ——, slip op. at 709-10. The thrust of our suggestion, however, was not that such postponement would be a ground for reversal. Rather, we intended to warn the government that, if the result of the postponed hearing were adverse, it might not be permitted to retry the defendant even though the untainted evidence would be sufficient to support a conviction. Tortorello's reliance on *Birrell* for reversal of his conviction is misplaced.

Opinion in the United States District Court

No. 70 CR 884.

UNITED STATES DISTRICT COURT, S. D. NEW YORK.

May 18, 1972.

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

ARTHUR TORTORELLO *et al.*,

Defendants.

Motion to suppress evidence secured by electronic surveillance in prosecution for violation of anti-fraud provisions of the securities laws. The District Court, Pollack, J., held the requirements of Title III of the Omnibus Crime Control and Safe Streets Acts and applicable state law were satisfied; that the state District Attorney or his Deputy properly authorized each eavesdropping warrant application; that the personal appearance of the District Attorney was not required before the issuing justice where an assistant appeared whose affidavit supplied the probable cause; that swearing to the affidavits in support of the applications before an office notary was constitutionally sufficient; that criminal fencing activities are within the scope of "designated offenses" subject to electronic surveillance; that the applications were sufficiently particular; that the express finding of the issuing justice that essential, comparable evidence could not be obtained except by electronic surveillance was sufficient when read in the context of the

supporting affidavits; that the supporting affidavits demonstrated probable cause; that each renewal application showed new probable cause for the continuance of the surveillance; that the surveillance was conducted properly where non-pertinent information monitored was *de minimis;* that unanticipated evidence of crime secured under an otherwise valid eavesdropping warrant directed at other crimes is admissible in a prosecution in which such proof is relevant; and that earlier illegal surveillance did not taint the proof obtained from sources not tainted.

Motions denied.

1. Telecommunications

Fact that district attorney did not submit application for eavesdrop warrants in person to issuing justice but acted through his assistant did not mean that applications therefor were improper, and assistant's appearance was sufficient. 18 U.S.C.A. § 2516(1, 2); Code Cr.Proc.N.Y. §§ 794, 814.

2. Telecommunications

Fact that affidavits in support of issuance of eavesdrop warrants were taken before office notary public prior to time affiant appeared before issuing magistrate rather than sworn to in presence of issuing justice did not require vacating of the warrants where the justice was in fact provided opportunity for any inquiry into probable cause. 18 U.S.C.A. § 2516(1, 2); Code Cr.Proc.N.Y. §§ 794, 814; U.S.C.A. Const. Amend. 4.

3. Searches and Seizures

In New York a search warrant may be issued by magistrate on an affidavit previously sworn to before a notary,

provided that the affiant appears before issuing magistrate. U.S.C.A.Const. Amend. 4.

4. Searches and Seizures

Requirement in Fourth Amendment of an oath or affirmation attesting to probable cause does not include a requirement that it be administered by or in presence of issuing magistrate. U.S.C.A.Const. Amend. 4.

5. Searches and Seizures

Requirement of oath of a responsible public officer to the showing of probable cause is to make affiant legally responsible for any statements of fact relied upon by judge who issues warrant, and that objective is accomplished when affidavit is sworn to before an office notary public as well as when administered by or in presence of magistrate. U.S.C.A.Const. Amend. 4.

6. Telecommunications

Where in first order authorizing eavesdropping justice found reasonable grounds to believe that evidence of crimes of robbery, burglary, possession of weapons as a felony, forgery as a felony, possession of forgery devices, grand larceny, criminal possession of stolen property as a felony and conspiracy to commit those crimes might be obtained by intercepting, and detection of organized crime fencing was a plain purpose of investigation, the object of investigations was properly within the scope of offenses designated in statute for which eavesdropping warrants are issuable. 18 U.S.C.A. § 2516(2).

7. Telecommunications

Where affidavits in support of applications for orders authorizing eavesdropping detailed suspected fencing operations and their breadth reflected wide scope of suspected criminal activities rather than an improper intention on part of state authorities merely to secure a "roving commission," applications were sufficiently particular. 18 U.S.C.A. § 2518(1) (b).

8. Telecommunications

Finding by judge on application for eavesdropping warrant that he was "satisfied that comparable evidence essential for the prosecution of said crimes could not be obtained by other means" was a sufficient and appropriate finding, when read in context of attached affidavits, to support order. 18 U.S.C.A. § 2518(3) (c).

9. Telecommunications

There is no requirement that particular words be used in requisite finding on application for eavesdropping warrants as to sufficiency of normal investigative procedures or that finding be actually expressed in words rather than by act of the judge, and substantial compliance was all that was required. 18 U.S.C.A. § 2518(3) (c).

10. Telecommunications

Where same surveillance which produced plainly sufficient probable cause for eavesdropping warrants with respect to one person yielded information that defendant was customarily present with that person at shop during course of the latter's dealings and regular meetings of the two were observed in vicinity of the partition, "particularly

behind it," both had criminal records and informant reported overhearing conversations between the two in respect to stolen goods, there was probable cause to monitor shop with respect to defendant's conversations to ground first order in series. 18 U.S.C.A. §§ 2510-2520.

11. Telecommunications

Independent surveillance by state agents and reports of other informants applied requisite corroboration and indicia of trustworthiness of questioned informant so that his report could properly be considered on issue of probable cause to support eavesdropping warrant. 18 U.S.C.A. §§ 2510-2520.

12. Criminal Law

Statements of defendant in conversations in which another participated, for whom there was ample probable cause to support eavesdropping warrant with respect to his conversations, would be admissible. 18 U.S.C.A. §§ 2510-2520.

13. Telecommunications

Where each renewal affidavit in support of eavesdropping warrant showed that daily transcripts of intercepts were forwarded to the justice and each affidavit contained fresh evidence of probable cause, both by summary of and by direct quote from the transcripts, renewals of the orders were properly based on fresh probable cause. 18 U.S.C.A. §§ 2510-2520.

14. Telecommunications

Where detectives who monitored conversations testified to compliance with their instructions reasonably designed

to assure conduct of eavesdrops in such a way as to minimize interception of nonpertinent communications and their testimony and daily records or line sheets indicated that they complied with their instructions during the interceptions and excess items were de minimis, there was sufficient showing that genuine and acceptable safeguards and efforts were made to minimize interception of nonpertinent conversations in compliance with statute. 18 U.S.C.A. § 2518 (5).

15. Criminal Law

Eavesdropping evidence of a crime which is the unanticipated and unexpected fruit of monitoring directed at other alleged crimes is not per se illegal, and unanticipated evidence is admissible in a prosecution in which such proof is relevant. 18 U.S.C.A. § 2517(5).

16. Telecommunications

Valid applications and orders validly executed permit use of unexpected conversations that have been garnered although they deal with other crimes than those which have initiated the intercept. 18 U.S.C.A. § 2517(5).

17. Criminal Law

Assuming illegality of prior surveillance, the government has burden of showing beyond a reasonable doubt that proof used at trial was free of any taint of that illegality. 18 U.S.C.A. §§ 2510-2520.

18. Criminal Law

Assuming that prior eavesdropping used more than six years before eavesdropping order in question, was illegal,

where evidence used on trial did not result from the earlier eavesdropping and those involved in prosecution of case had no knowledge of the prior assertedly illegal eavesdropping, defendant was not entitled to relief on that ground. 18 U.S.C.A. §§ 2510-2520.

19. Criminal Law

Where it appears beyond reasonable question that no substantial portion of case against defendants is fruit of a poisonous tree, conviction may not be overturned.

Whitney North Seymour, Jr., U. S. Atty. for Southern District of New York, by Patrick T. Burke, of counsel, for plaintiff.

Elliot A. Taikeff, New York City, for defendant Tortorello.

John E. Dennett, pro se.

Pollack, District Judge.

The Motion Before the Court

The defendants Arthur Tortorello (a/k/a Artie Todd) and John Dennett moved before trial to suppress tape recorded evidence obtained by electronic surveillance pursuant to state court orders made in 1969. The defendants contended that the state court orders were improperly i) sought, ii) granted, iii) renewed, and iv) executed. In addition, having been advised on March 10, 1972, that from 1961 to 1963 Tortorello had been the subject of F.B.I. electronic surveillance in which trespass was involved, Tortorello contends that the 1961-63 federal surveillance set

in motion the chain of events leading to the government's evidence now sought to be suppressed which was obtained under the 1969 state court orders.

Decision on the motion to suppress was held in abeyance until after the trial. The questioned tape recordings were utilized on the trial by the government. The moving defendants were found guilty of all charges against them of violation of the anti-fraud provisions of the federal securities laws. In consequence, if the eavesdrop evidence was illegally obtained, the verdicts must be set aside.

The principal issue now to be considered is whether the 1969 electronic surveillance complied with Title III of the Omnibus Crime Control and Safe Streets Act (18 U.S.C. §§ 2510-20) which created uniform prerequisites and standards to be observed by state and federal authorities.

The State and Federal Legislation

It will be useful to review the sequence and scope of the state and federal legislation involved.

At its 1968 session, the New York Legislature passed a bill prescribing a comprehensive scheme for the restricted issuance of eavesdropping warrants,[1] based upon strict standards of probable cause and necessity and demanding scrupulous particularity in the description both of the person and place upon which the eavesdropping is to be conducted and the nature of the evidence sought thereby. N.Y. Laws 1968, c. 546. The new statutory scheme was designed to comply with the constitutional standards enunciated in Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967) and Katz v. United States, 389 U.S. 347, 88

[1] An order authorizing the interception of wire or oral communications is called, by the New York State Criminal Procedure Law, an "eavesdropping warrant".

S.Ct. 507, 19 L.Ed.2d 576 (1967). The bill became effective June 5, 1968.

Within a few days, however, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968, Title III of which relates exclusively to eavesdropping. This new federal law provided that in order to protect the privacy of wire and oral communications, it was necessary for Congress to define on "a uniform basis" the circumstances under which eavesdrops may be authorized by the individual states. The federal Act became law on June 19, 1968.

On May 26, 1969, New York State enacted Chapter 1147 of the Laws of 1969, effective June 26, 1969, which harmonized state law with federal law. Title III, §§ 814-825, Criminal Procedure Law (now Article 700 of the New York Criminal Procedure Law).

The evidence which is questioned on this motion consists of conversations of the defendant Tortorello which were intercepted and recorded by New York City's police authorities pursuant to a series of eavesdropping warrants authorized by the state court. These conversations took place at Todd Associates, 120 West 44th Street, New York, New York and over Todd's office telephone lines.

The Interception Order of December 10, 1969

The first order authorizing eavesdropping on conversations at Todd's premises was signed on December 10, 1969, by State Supreme Court Justice Mitchell D. Schweitzer on the application of the New York County District Attorney. The application for this order incorporated prior orders by reference which are referred to as the "Seven Orders", together with their supporting affidavits.

The "Seven Orders" Preceding the Order of December 10, 1969

The "Seven Orders" were a series of earlier eavesdropping warrants, the earliest of which was signed on June 2, 1969. These authorized eavesdrops at the offices and tapping of the telephone lines of Rio Coin Corporation and of Jacob Maishlish (also Jack Mace) at 1147 Avenue of the Americas.

The "Seven Orders" were based essentially on the finding by Justice Schweitzer of reasonable grounds to believe that Mace, Tortorello and others used the Rio Coin offices and facilities to conduct illicit dealings in stolen goods and forged credit cards.

It was during the Rio Coin surveillance that the state authorities applied for and obtained a second set of State Court orders which authorized surveillance of Tortorello and eavesdropping and telephone taps at the Todd Associates office. Suspect conversations seemingly dealing with fraudulent security transactions were unanticipated fruit of the surveillance of the Todd Associates offices and facilities. The surveillance team thereupon notified federal authorities, and SEC and Joint Strike Force representatives joined the state surveillance team. It was this surveillance that yielded the intercepted and recorded communications now sought to be suppressed.

Since the validity of every step of the procedures involved in procuring the intercepted conversations has been questioned, each will be treated in turn.

1. *The Applications for the Eavesdrop Warrants*

The defendants contend that the eavesdrop warrants were improperly applied for because (1) the District At-

torney of New York County, Hon. Frank Hogan, did not submit his application therefor in person to the issuing Justice, but acted through his assistant, and (2) the contents of the affidavits of both the District Attorney and his assistant were not sworn to by these officials in the presence of the issuing Justice but before a notary public prior to the appearance of the assistant before the Justice.

The evidentiary hearing disclosed the use of the following procedure.

Lawrence Hochheiser, an Assistant District Attorney, was assigned to the Rio Coin and ultimately to the Todd Associates cases. He prepared all of the proposed eavesdrop application papers. These were then reviewed in conference between Hochheiser and the Chief of the Rackets Bureau, Alfred J. Scottie, particularly where an original as distinguished from a renewal order was to be sought. Hochheiser then presented the proposed application papers with any conference amendments to the District Attorney himself. With one exception,[2] Mr. Hogan gave each application his personal attention, with Hochheiser at hand for clarification and discussion. At the end of the inspection and conference, both officers swore to the final form of their respective affidavits before an office notary public.

Mr. Hochheiser's affidavit recited the factual grounds for the issuance of the eavesdrop or wiretap order. Mr. Hogan averred in his affidavit that he had read the Hochheiser affidavit and that:

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[2] In the fourth application in the Seven Orders series (a renewal application), Alfred J. Scottie, as Acting District Attorney, supplied the authorization affidavit. Defendants do not contend that this vitiates the fourth order, nor would it under the circumstances. C.P.L. § 700.05(5), *cf.* United States of America v. Pisacano et al., 459 F.2d 259 (2d Cir. 1972).

> Based upon the facts set forth in Mr. Hochheiser's affidavit, I respectfully submit to the Court that there are reasonable grounds to believe that the essential evidence of crime may be obtained by the interception of the wire and oral communications described [in one of the numbered paragraphs of the Hochheiser affidavit].

Mr. Hogan was the named applicant for the eavesdrop warrants. The Hogan affidavits contained both the authorization for the application and the opinion that no practical alternative means of acquiring comparable evidence or information existed. The Hochheiser affidavits also recited that the evidence sought could not be obtained except by eavesdrops and telephone tapping.

The papers were then conveyed by Mr. Hochheiser to Justice Schweitzer, who examined the affidavits with Hochheiser present and available for any questions, before deciding whether to grant the District Attorney's application. Hochheiser did not recall swearing to his affidavit a second time before Justice Schweitzer. Mr. Hogan did not appear personally before the Justice on any occasion.

In advancing the contention that the personal presence of the District Attorney was required before the state justice, Tortorello relies upon 18 U.S.C. § 2516(1) and (2), which designate, respectively, the federal and state officials empowered to apply for eavesdrop and wiretap orders. The defendants point to language differences in the two subdivisions which they contend call for different procedures, i.e., that whereas § 2516(1) permits the United States Attorney General to "authorize an application" to a federal judge for eavesdrop warrants, § 2516(2) provides that the state's "principal prosecuting attorney" or the "principal

prosecuting attorney of any political subdivision thereof" "may apply" for similar orders to state judges. According to the defendants, construed together, the foregoing provisions "require the personal presence of [the county district attorney] before the issuing magistrate".

[1] The Senate Judiciary Committee's report, S.Rep. No. 1097 at p. 98, U.S. Code Cong. & Admin. News, 1968, p. 2187, contains the following paraphrase of § 2516(2) indicating that the language difference which the defendants point out as between the federal and state prosecutors was not intended to require the state prosecutor's personal presence before the issuing magistrate:

> Paragraph (2) [of § 2516] provides that the principal prosecuting attorney of any State or the principal prosecuting attorney of any political subdivision of a State *may authorize* an application to a State judge of competent jurisdiction . . . for an order authorizing the interception of wire or oral communications. [Emphasis supplied.]

As additional support for their argument, the defendants point to § 794 of the former New York Code of Criminal Procedure, N.Y. Laws 1962, c. 542, § 3, which provided in part that "The person seeking the warrant shall appear personally before the [issuing] judge, justice or magistrate. . . . " People v. Ricken, 29 A.D.2d 192, 287 N.Y.S.2d 118 (3d Dept. 1968), aff'd, 27 N.Y.2d 923, 318 N.Y.S.2d 142, 266 N.E.2d 821 (1970), held that "the use of the words 'shall appear' in section 794 intended a mandate to the applicant for the [search] warrant to personally appear before the issuing judge." Section 2516(2) of Title 18, U.S.C., requires compliance with applicable state statutes. *See* State v. Siegel, 13 Md.App. 444, 285 A.2d 671 (1971).

The short answer to the defendants' argument under § 794 is that Hochheiser's appearance before Justice Schweitzer sufficiently satisfies this provision if § 794 were deemed applicable to eavesdrop warrants. However, § 794 is probably not applicable to orders authorizing eavesdropping and wire tapping. Section 794 was contained in a title designated "Of Search Warrants" (Title II of Part IV of the Code of Criminal Procedure). On the other hand, Title III of Part IV dealt expressly with "Eavesdropping Warrants." The state laws of 1968 and 1969 each contained § 814 which provided in part that in the District Attorney's absence "applicant" should mean "that person designated to act for him and perform his official function in and during his actual absence." Thus, even if the search warrant provisions were to be read into the provisions controlling eavesdrop warrants, on the particular question of whether the District Attorney's personal appearance before the issuing justice was required, § 814 expressly overrode § 794. Hochheiser's function was consistent with this construction.

[2, 3] The fact that the affidavits in support of the issuance of an eavesdropping warrant were taken before an office notary public prior to the time the affiant appeared before the issuing magistrate is of no consequence and does not require the vacating of those warrants. People v. Mancinelli, 50 Misc.2d 952, 271 N.Y.S.2d 919 (1966), People v. Sullivan, 40 Misc.2d 278, 242 N.Y.S.2d 988 (1963). The rule in New York is that a search warrant may be issued by a magistrate on an affidavit previously sworn to before a notary, provided that the affiant appears before the issuing magistrate. Justice Schweitzer in fact was provided the opportunity for any inquiry into probable cause; this is sufficient. *Cf.* People v. Ricken, 29 A.D.2d

192, 287 N.Y.S.2d 118 (3d Dept. 1968), aff'd 27 N.Y.2d 923, 318 N.Y.S.2d 142, 266 N.E.2d 821 (1970). Mr. Hogan's absence is not material, for Mr. Hogan's affidavit did not supply the averments going to probable cause.

[4, 5] Nothing in the Fourth Amendment required the prosecuting attorneys to swear to contents of their affidavits in the presence of a judge. The Fourth Amendment simply provides that "no warrants shall issue, but upon probable cause, supported by Oath or Affirmation. . . ." The requirement of an "Oath or Affirmation" attesting to the probable cause does not include a requirement that it be administered by or in the presence of the issuing magistrate. Veeder v. United States, 252 F. 414 (7th Cir.), cert. denied, 246 U.S. 675, 38 S.Ct. 428, 62 L.Ed. 933 (1918); United States v. Whitlow, 339 F.2d 975 (7th Cir. 1964), warrant vacated on other grounds. *But cf.* Dudley v. United States, 320 F.Supp. 456, 459 (N.D.Ga.1970). The requirement in the law of the oath of a responsible public officer to the showing of the probable cause was to make the affiant legally responsible for any statements of fact relied upon by the Judge who issues the warrant. *See* Veeder v. United States, 252 F. 414 (7th Cir.), cert. denied, 246 U.S. 675, 38 S.Ct. 428, 62 L.Ed. 933 (1918), *cf.* Sherrick v. Eyman, 389 F.2d 648 (9th Cir.), cert. denied, 393 U.S. 874, 89 S.Ct. 167, 21 L.Ed.2d 144 (1969); People v. Tennyson, 19 N.Y.2d 573, 576, 281 N.Y.S.2d 76, 227 N.E.2d 876 (1967). *But cf.* Rose v. United States, 45 F.2d 459, 464 (8th Cir. 1930). Clearly, this objective is accomplished when the affidavit is sworn to before an office notary public as well as when administered by or in the presence of the magistrate.

2. The Subject Matter of the Investigation

[6] The defendants contend that the object of the investigations was not within the scope of the offenses designated in the statute for which eavesdropping warrants are issuable. The "designated offenses" are described in 18 U.S.C. § 2516(2) and include investigation of any "crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year." [3]

In the first Rio Coin order, Justice Schweitzer found that "there are reasonable grounds to believe evidence of the crimes of robbery, burglary, possession of weapons as a felony, forgery as a felony, possession of forgery devices, grand larceny, criminal possession of stolen property as a felony and conspiracy to commit said crimes may be obtained by intercepting. . . ."

Justice Schweitzer's finding has a firm basis in the application of the District Attorney; the affidavit of Hochheiser describes in detail the criminal conduct of Jack Mace and his associates. The detection of organized crime fencing, which has a necessary and immediate connection to the offenses specified in the order, was a plain purpose of the Mace-Tortorello investigation. The Senate Report makes clear that the provisions of the statute were enacted "to make it possible to strike at organized crime fencing." (p. 98 U.S.Code Cong. & Admin.News, 1968, p. 2186).

The Report, moreover, explains the limitation to crimes "dangerous to life, limb, or property" as follows (S.Rep. No. 1097 at p. 99 U.S.Code Cong. & Admin.News, 1968, p. 2187):

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[3] Among these crimes, § 2516(2) expressly designates the offenses of murder, kidnapping, gambling, robbery, bribery, extortion and dealing in dangerous drugs, but without limiting the offenses available for investigation to that list.

> This limitation is intended to exclude such offenses as fornication and adultery, which do not involve danger to life, limb, or property. The term "property," however, is not to be read restrictively. For example, the activities of organized crime in "cigarette bootlegging," which pose a substantial threat to the revenue of some cities and States, could be made a designated offense if the penalty were made high enough.

Accordingly, there is no merit to the contention of the defendants that the offenses sought to be unearthed by the investigation were not within the statutory "designated offenses".

3. *Particularity of Application*

[7] The defendants contend that the applications for the orders were not sufficiently particular. 18 U.S.C. § 2518(1)(b). There is no substance to that criticism. The affidavits detail suspected fencing operations. Their breadth reflects the wide scope of the suspected criminal activity rather than an improper intention on the part of the state authorities merely to secure a "roving commission". The more appropriate inquiry, which will be treated hereafter, is whether probable cause for such an investigation was sufficiently shown. *Cf.* U. S. v. Becker, 334 F.Supp. 546, 549 (S.D.N.Y.1971).

4. *Sufficiency of Normal Investigative Procedures*

[8] The next contention is that the applications for warrants failed to show that normal investigative procedures had been tried and had failed, or appeared unlikely to succeed if tried. Section 2518(3)(c) of Title 18, U.S.C. requires the magistrate to make the required finding on the

basis of the appropriate averments in the supporting affidavits. The finding as expressed here was that the Judge was "satisfied that *comparable* [emphasis supplied by defendants] evidence essential for the prosecution of said crimes could not be obtained by other means". This is a sufficient and appropriate finding when read in the context of the attached affidavits.

[9] There is nothing in § 2518(3) (c) which requires that particular words be used in the requisite finding or indeed that the finding be actually expressed in words rather than by the act of the Judge. *See* United States v. Escander, 319 F.Supp. 295, 304 (S.D.Fla.1970); *cf.* United States v. Poeta, 455 F.2d 117, 120 (2d Cir. 1972); United States v. Focarile, 11 Cr.L.Rep. 2008 (D.C.Md.1972); United States v. Leta, 332 F.Supp. 1357, 1362 (M.D.Pa.1971). "Substantial compliance" is all that is required by § 2516(3) (c). *See* United States v. King, 335 F.Supp. 523, 535 (S.D.Calif. 1971).

5. *Probable Cause to Monitor Tortorello*

[10] Defendants contend that probable cause to monitor the Rio Coin shop with respect to Tortorello's conversations did not exist to ground the first order in the Rio Coin series and that this defect invalidates each succeeding order as to Tortorello in the Rio Coin and Todd Associates sets. They do not contend that probable cause was absent with respect to the conversations of Jack Mace at the Rio Coin premises; indeed there was ample probable cause. Their argument, in essence, is that there must be a discrete finding of probable cause in respect to each identifiable person known to use the facilities in question in order to authorize

an intercept of that person's conversations; and that such a requirement was not satisfied as to Tortorello.

The same conventional surveillance which produced the plainly sufficient probable cause for eavesdrop warrants with respect to Mace yielded the information that Arthur Tortorello was customarily present with Mace at the shop during the course of the latter's dealings. Regular meetings of the two were observed in the vicinity of the partition within the shop "particularly behind it". The proof showed that both Mace and Tortorello have criminal records and that an informant reported overhearing conversations between the two in respect to stolen goods. It was shown that the informant was an associate of Mace and that the informant knew him to be a fence. Independent conventional surveillance of the Rio Coin shop corroborated that the informant did, in fact, know and associate with the two.

[11] Nevertheless, the defendants question whether the report of an informant of "unknown reliability" may be considered on the issue of probable cause as to Tortorello. This question is resolved against Tortorello by United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971), which sustains as sufficient the indications of the informant's reliability supplied to Justice Schweitzer. The independent surveillance by the state agents and the reports of other informants supplied the requisite corroboration and the indicia of trustworthiness of the questioned informant. *See also* United States v. Alonzo, 447 F.2d 126 (2d Cir. 1971); United States v. Gardner, 436 F.2d 381 (2d Cir. 1971); United States v. Becker, 334 F.Supp. 546, 550-551 (S.D.N.Y.1971) (Weinfeld, J.).

[12] Incidentally, the statements of Tortorello in conversations in which Jack Mace participated would be admissible at all events. *See* United States v. Perillo, 333 F.Supp. 914 (D.Del.1971); United States v. King, 335 F. Supp. 523 (S.D.Calif.1971); United States v. Sklaroff, 323 F.Supp. 296 (S.D.Fla.1971).

6. *Renewals of Warrants*

Defendants contend that even if the first of the Rio Coin and Todd Associates orders were valid, the renewals of those orders were invalid because they were based on no "further accretion of evidence uncovered either by the operation of the first eavesdrop or by conventional investigative techniques in the meantime."

[13] This argument lacks any force since "fresh probable cause" *was* provided, and based each renewal order. The applications appended to the renewal orders indicated present probable cause in each case. Each renewal affidavit showed that daily transcripts of the intercepts were forwarded to Justice Schweitzer and each affidavit contained fresh evidence of probable cause, both by summary of and by direct quote from the transcripts. This Court was not requested to go behind these affidavits nor was any such issue relating to the renewal affidavits raised at the evidentiary hearing on this motion. The contentions as to the propriety of the renewal orders lack force. *Cf.* United States v. King, 335 F.Supp. 523, 537 (S.D.Calif.1971). The requirements of Berger v. New York, 388 U.S. 41, 59, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), that there should be a showing of present probable cause for the continuance of eavesdrops, were adequately satisfied.

7. *Manner of Execution of Warrants*

[14] The defendants also contend that the manner in which the intercepts were conducted resulted in monitoring and recording of a mass of non-pertinent and irrelevant conversations in violation of *Berger, supra*, and of § 2518 (5). However, it appears sufficiently that genuine and acceptable safeguards and efforts were made to minimize the interception of non-pertinent conversations in compliance with the statute.

The detectives who monitored the Todd Associates conversations testified to compliance with their instructions from Hochheiser and these were reasonably designed to assure conduct of the eavesdrops in such a way as to minimize the interception of non-pertinent communications. One of the detectives was familiar with the earlier monitoring at the Rio Coin site preceding the eavesdropping relating to the Todd Associates site. The testimony of the detectives and their daily records or line sheets indicate that they complied with their instructions during the interceptions. The line sheets indicate the time a conversation deemed pertinent commenced and ended and the nature of that conversation, and also contain entries noting the time non-pertinent calls or conversations were initiated. There were no gaps in the monitoring to be explained. The detectives testified that they monitored without significant exception only when they were also recording. This reduced or eliminated the opportunity for an improper eavesdrop which would not be recorded.

Obviously, some non-pertinent items crept in because they were recorded before a determination of their relevancy could be made. Other such items were included because they appeared in conversations also containing perti-

nent items. Still others represented a determination of pertinence with which the Court does not necessarily agree. However, overall, the excess items were *de minimis* and the compliance reasonably conformed to adequate rules set down for the intercept. *See* United States v. King, 335 F.Supp. 523 (S.D.Calif.1971); *cf.* United States v. Scott, 331 F.Supp. 233, 246 (D.D.C.1971).

The defendants raise a further issue relating to unanticipated evidence. They claim that the execution of the warrants was illegal because evidence was obtained thereby relating to stock fraud during the Todd Associates intercepts although the orders for the eavesdrop warrants were for the purpose of collecting evidence concerning stolen travel tickets, credit cards and the receipt of stolen goods.

According to the defendants, the collection and use of such evidence, indicates that the orders were used as "roving commissions" in violation of Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), Osborn v. United States, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966), and Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927).

[15, 16] Eavesdropping evidence of a crime which is the unanticipated and unexpected fruit of monitoring directed at other alleged crimes is not *per se* illegal. The unanticipated evidence is admissible in a prosecution in which such proof is relevant. United States v. Cox, 449 F.2d 679, 683-687 (10th Cir. 1971). Valid applications and orders validly executed permit the use of unexpected conversations that have been garnered, although they deal with other crimes than those which have initiated the intercept. 18 U.S.C. § 2517(5).

8. *The Effect of Prior Illegal Wiretaps*

The final contention of defendant Tortorello is that the evidence in question was procured by a direct exploitation of a prior illegal eavesdrop which was used by F.B.I. in 1961-63 or more than six years before the instant order of December 9, 1969. For purposes of this discussion the Court will even assume that these prior F.B.I. intercepts may have been directed at suspected stock fraud and that they were illegal (although there is no such proof now before the Court). That assumption obviates any need for production of the earlier intercepts.

[17] With the illegality of the prior surveillance assumed, the government has the burden of showing beyond a reasonable doubt that the proof used at trial was free of any taint of that illegality. Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939); U. S. v. Schipani, 289 F.Supp. 43, 63-64 (E.D.N.Y.1968), aff'd, 414 F.2d 1262 (2d Cir. 1969), cert. denied, 397 U.S. 922, 90 S.Ct. 902, 25 L.Ed.2d 102 (1970); United States v. Cole, 325 F.Supp. 763, 768 (S.D.N.Y.1971) (Pollack, J.). *But cf.* U. S. v. Friedland, 441 F.2d 855, 856 (2d Cir. 1971).

[18] The government has established by credible evidence beyond a reasonable doubt that the proof used in the trial stemmed from a legal source and was free of any taint of illegality.

The information obtained under the December 10, 1969, order was accounted for as to source.

The Hochheiser testimony at the evidentiary hearing established that the Todd Associates intercepts derived from the surveillance of the Rio Coin shop; that the Todd Associates surveillances were directed by state authorities

at suspected dealing in stolen stock; that during the course of these intercepts, unanticipated conversations with known stock manipulators and swindlers were monitored which concerned matter involving corporate affairs of certain named and unnamed corporations, and that SEC people and the Strike Force were then called in by the state authorities in relation to the unanticipated disclosures.

It plainly appears that those involved in the prosecution of this case had no knowledge of the illegal eavesdropping on the part of the government. In the March 2, 1972, Burke affidavit, the averments of which were not challenged, the prosecutor avers that neither he nor "any member of the prosecutorial team" was ever aware of the prior surveillance of the F.B.I. until the attorney for the defendant asked about it after the case was tried and an inquiry then sent to Washington resulted in the February 28, 1972 letter from the Justice Department disclosing the same.

It may well be that the protection afforded to the defendants does not depend upon the existence of such knowledge. *See Cole,* 325 F.Supp. at 771; *but cf. Friedland,* 441 F.2d at 859. However, it depends at least upon whether the government's evidence used on the trial of this case was yielded by or resulted from the eavesdropping in 1961-63. That is not the case here.

[19] Additionally, it appears beyond reasonable question that no substantial portion of the case against the defendants was a fruit of any poisonous tree. In such a situation, a conviction may not be overturned. Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939). The significant evidence in this case was all of independent and recent origin. There is no reasonable possibility that a substantial portion of the case was tainted.

Conclusion

The defendants' motions based on unlawful electronic surveillance present contentions which individually and collectively are wanting in substance and in merit and the motions are, in all respects, denied.

The foregoing shall constitute the Court's findings and conclusions.

Presentence reports will be ordered herein. The date fixed for sentence is June 30, 1972 at 10 A.M.

So ordered.

Statutes Involved

N.Y. CODE OF CRIMINAL PROCEDURE §§ 814-25

§ 814. Eavesdropping warrants; definitions of terms.—As used in this title the following meanings:

1. "Eavesdropping" means "wiretapping" or "mechanical overhearing of conversation", as those terms are defined in section 250.00 of the penal law.

2. "Eavesdropping warrant" means an order of a justice authorizing or approving eavesdropping.

3. "Intercepted communication" means (a) a telephonic or telegraphic communication which was intentionally overheard or recorded by a person other than the sender or receiver thereof, without the consent of the sender or receiver, by means of any instrument, device or equipment, or (b) a conversation or discussion which was intentionally overheard or recorded, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment. The term "contents", when used with respect to a communication, includes any information concerning the identity of the parties to such communications, and the existence, substance, purport, or meaning of that communication. The term "communication" includes conversation and discussion.

4. "Justice", except as otherwise provided herein, means any justice of an appellate division of the judicial department in which the eavesdropping warrant is to be executed, or any justice of the supreme court of the judicial district

in which the eavesdropping warrant is to be executed, or any county court judge of the county in which the eavesdropping warrant is to be executed.

5. "Applicant" means a district attorney or the attorney general. If a district attorney or the attorney general is actually absent or disabled the term "applicant" shall mean that person designated to act for him and perform his official function in and during his actual absence or disability.

6. "Law enforcement officer" means any public servant who is empowered by law to conduct an investigation of or to make an arrest for a designated offense, and any attorney authorized by law to prosecute or participate in the prosecution of a designated offense.

7. "Exigent circumstances" means conditions requiring the preservation of secrecy, and whereby there is a reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to surveillance to the fact that such surveillance had occurred.

8. "Designated offense" means any one or more of the following crimes:

(a) A conspiracy to commit any offense enumerated in the following paragraphs of this subdivision or, an attempt to commit any felony enumerated in the following paragraphs of this subdivision which attempt would itself constitute a felony;

(b) Any of the following felonies: assault in the second degree as defined in section 120.05 of the penal law, assault

in the first degree as defined in section 120.10 of the penal law, reckless endangerment in the first degree as defined in section 120.25 of the penal law, promoting a suicide attempt as defined in section 120.30 of the penal law, criminally negligent homicide as defined in section 125.10 of the penal law, manslaughter in the second degree as defined in section 125.15 of the penal law, manslaughter in the first degree as defined in section 125.20 of the penal law, murder as defined in section 125.25 of the penal law, abortion in the second degree as defined in section 125.40 of the penal law, abortion in the first degree as defined in section 125.45 of the penal law, rape in the third degree as defined in section 130.25 of the penal law, rape in the second degree as defined in section 130.30 of the penal law, rape in the first degree as defined in section 130.35 of the penal law, sodomy in the third degree as defined in section 130.40 of the penal law, sodomy in the second degree as defined in section 130.45 of the penal law, sodomy in the first degree as defined in section 130.50 of the penal law, sexual abuse in the first degree as defined in section 130.65 of the penal law, unlawful imprisonment in the first degree as defined in section 135.10 of the penal law, kidnapping in the second degree as defined in section 135.20 of the penal law, kidnapping in the first degree as defined in section 135.25 of the penal law, custodial interference in the first degree as defined in section 135.50 of the penal law, coercion in the first degree as defined in section 135.65 of the penal law, burglary in the third degree as defined in section 140.20 of the penal law, burglary in the second degree as defined in section 140.25 of the penal law, burglary in the first degree as defined in section 140.30 of the penal law, criminal mischief in the second degree as defined in section 145.05 of

the penal law, criminal mischief in the first degree as defined in section 145.10 of the penal law, criminal tampering in the first degree as defined in section 145.20 of the penal law, arson in the third degree as defined in section 150.05 of the penal law, arson in the second degree as defined in section 150.10 of the penal law, arson in the first degree as defined in section 150.15 of the penal law, grand larceny in the third degree as defined in section 155.30 of the penal law, grand larceny in the second degree as defined in section 155.35 of the penal law, grand larceny in the first degree as defined in section 155.40 of the penal law, robbery in the third degree as defined in section 160.05 of the penal law, robbery in the second degree as defined in section 160.10 of the penal law, robbery in the first degree as defined in section 160.15 of the penal law, unlawful use of secret scientific material as defined in section 165.07 of the penal law, criminal possession of stolen property in the second degree as defined in section 165.45 of the penal law, criminal possession of stolen property in the first degree as defined in section 165.50 of the penal law, forgery in the second degree as defined in section 170.10 of the penal law, forgery in the first degree as defined in section 170.15 of the penal law, criminal possession of a forged instrument in the second degree as defined in section 170.25 of the penal law, criminal possession of a forged instrument in the first degree as defined in section 170.30 of the penal law, criminal possession of forgery devices as defined in section 170.40 of the penal law, falsifying business records in the first degree as defined in section 175.10 of the penal law, tampering with public records in the first degree as defined in section 175.25 of the penal law, offering a false instrument for filing in the first degree as defined in section 175.35 of the penal law, issuing a false certificate as

defined in section 175.40 of the penal law, escape in the second degree as defined in section 205.10 of the penal law, escape in the first degree as defined in section 205.15 of the penal law, promoting prison contraband in the first degree as defined in section 205.25 of the penal law, hindering prosecution in the second degree as defined in section 205.60 of the penal law, hindering prosecution in the first degree as defined in section 205.65 of the penal law, and any of the felonies defined in sections 265.05, 265.10 or 265.35 of the penal law relating to firearms and other dangerous weapons;

(c) Any of the following crimes: criminal possession of a dangerous drug in the fourth degree as defined in section 220.05 of the penal law, criminal possession of a dangerous drug in the third degree as defined in section 220.10 of the penal law, criminal possession of a dangerous drug in the second degree as defined in section 220.15 of the penal law, criminal possession of a dangerous drug in the first degree as defined in section 220.20 of the penal law, criminally selling a dangerous drug in the third degree as defined in section 220.30 of the penal law, criminally selling a dangerous drug in the second degree as defined in section 220.35 of the penal law, criminally selling a dangerous drug in the first degree as defined in section 220.40 of the penal law, criminally possessing a hypodermic instrument as defined in section 220.45 of the penal law, promoting gambling in the second degree as defined in section 225.05 of the penal law, promoting gambling in the first degree as defined in section 225.10 of the penal law, possession of gambling records in the second degree as defined in section 225.15 of the penal law, possession of gambling records in the first degree as defined in section

225.20 of the penal law, and possession of a gambling device as defined in section 225.30 of the penal law;

(d) Commercial bribing, commercial bribe receiving, bribing a labor official, bribe receiving by a labor official, sports bribing and sports bribe receiving, as defined in article one hundred eighty of the penal law;

(e) Criminal usury, as defined in article one hundred ninety of the penal law;

(f) Bribery, bribe receiving, bribe giving for public office and bribe receiving for public office, as defined in article two hundred of the penal law;

(g) Bribing a witness, bribe receiving by a witness, bribing a juror and bribe receiving by a juror, as defined in article two hundred fifteen of the penal law;

(h) Promoting prostitution in the first degree, as defined in article two hundred thirty of the penal law;

(i) Riot in the first degree and criminal anarchy, as defined in article two hundred forty of the penal law;

(j) Eavesdropping, as defined in article two hundred fifty of the penal law.

§ 815. Eavesdropping warrants; in general.—1. Under circumstances prescribed in this title, a justice may issue an eavesdropping warrant upon ex parte application of an applicant who is a district attorney authorized by law to prosecute or participate in the prosecution of the particular designated offense which is the subject of the application, or the attorney general.

2. No eavesdropping warrant may authorize the interception of any communication for any period longer than

is necessary to achieve the objective of the authorization, or in any event longer than thirty days.

§ 816. Eavesdropping warrants; when issuable.—An eavesdropping warrant may issue only:

1. Upon an appropriate application made in conformity with this title; and

2. Upon probable cause to believe that a particularly described person is committing, has committed, or is about to commit a particular designated offense; and

3. Upon probable cause to believe that particular communications concerning such offense will be obtained through eavesdropping; and

4. Upon a showing that normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ; and

5. Upon probable cause to believe that the facilities from which, or the place where, the communications are to be intercepted, are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

§ 817. Eavesdropping warrants; application.—1. An ex parte application for an eavesdropping warrant must be made to a justice in writing, and must be subscribed and sworn to by an applicant.

2. The application must contain:

(a) The identity of the applicant and a statement of the applicant's authority to make such application; and

(b) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an eavesdropping warrant should be issued, including (i) a statement of facts establishing probable cause to believe that a particular designated offense has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of the communications sought to be intercepted, and (iv) the identity of the person, if known, committing such designated offense and whose communications are to be intercepted; and

(c) A statement that such communications are not otherwise legally privileged; and

(d) A full and complete statement of facts establishing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence sought; and

(e) A statement of the period of time for which the eavesdropping is required to be maintained. If the nature of the investigation is such that the authorization for eavesdropping should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter; and

(f) A full and complete statement of the facts concerning all previous applications, known to the applicant, for an eavesdropping warrant involving any of the same persons, facilities or places specified in the application, and the action taken by the justice on each such application.

3. Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts stated in the application are derived in whole or part from the statements of persons other than the applicant, the sources of such facts must be either disclosed or described, and the application must contain facts establishing the existence and reliability of the informants or the reliability of the information supplied by them. The applicatior must also state, so far as possible, the basis of the informant's knowledge or belief. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be used either on personal knowledge of the affiant, or information and belief with the source thereof and the reason therefor specified.

§ 818. Eavesdropping warrants; determination of application.—1. If the application conforms to section eight hundred seventeen, the justice may require the applicant to furnish additional testimony or documentary evidence in support of the application. He may examine under oath or affirmation any person for the purpose of determining whether grounds exist for the issuance of the warrant pursuant to section eight hundred sixteen. Any such ex-

amination must be either recorded or summarized in writing.

2. If the justice determines on the basis of the facts submitted by the applicant that grounds exist for the issuance of an eavesdropping warrant pursuant to section eight hundred sixteen, the justice may grant the application and issue an eavesdropping warrant, in accordance with section eight hundred nineteen.

3. If the application does not conform to section eight hundred seventeen, or if the justice is not satisfied that grounds exist for the issuance of an eavesdropping warrant, the application must be denied.

§ 819. Eavesdropping warrants; form and content.—An eavesdropping warrant must contain:

1. The name of the applicant, date of issuance, and the subscription and title of the issuing justice; and

2. The identity of the person, if known, whose communications are to be intercepted; and

3. The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted; and

4. A particular description of the type of communications sought to be intercepted, and a statement of the particular designated offense to which is* relates; and

5. The identity of the law enforcement agency authorized to intercept the communications; and

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* So in original: Probably "it" intended.

6. The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained; and

7. A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this title, and must terminate upon attainment of the authorized objective, or in any event in thirty days; and

8. An express authorization to make secret entry upon a private place or premises to install an eavesdropping device, if such entry is necessary to execute the warrant.

§ 820. Eavesdropping warrants; manner and time of execution.--1. An eavesdropping warrant must be executed according to its terms by a law enforcement officer who is a member of the law enforcement agency authorized in the warrant to intercept the communications.

2. Upon termination of the authorization in the warrant, eavesdropping must cease and any device installed for such purpose must be removed or permanently inactivated as soon as practicable. Entry upon a private place or premise for the removal or permanent inactivation of such device is deemed to be authorized by the warrant.

3. The contents of any communication intercepted by any means authorized by this title shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any such communication shall be done in such way as will protect the recording from editing or other alterations.

§ 821. Eavesdropping warrants; order of extension.—Anytime prior to the expiration of an eavesdropping warrant, the applicant may apply to the issuing justice, or, if he is unavailable, to another justice, for an order of extension. The period of extension shall be no longer than the justice deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. The application for an order of extension must conform in all respects to the provisions of section eight hundred seventeen and, in addition, must contain a statement setting forth the results thus far obtained from the intereception, or a reasonable explanation of the failure to obtain such results. The provisions of sections eight hundred sixteen and eight hundred eighteen are applicable in the determination of such application. The order of extension must conform in all respects to the provisions of section eight hundred nineteen. In the execution of such order of extension, the provisions of section eight hundred twenty are applicable.

§ 822. Eavesdropping warrants; progress reports and notice.—1. An eavesdropping warrant may require reports to be made to the issuing justice showing what progress has been made toward achievement of the authorized objective and the need for continued eavesdropping. Such reports shall be made at such intervals as the justice may require.

2. Immediately upon the expiration of the period of an eavesdropping warrant, the recordings of communications made pursuant to subdivision three of section eight hundred twenty shall be made available to the issuing justice and sealed under his directions.

3. Within a reasonable time, but in no case later than ninety days after termination of an eavesdropping warrant, or expiration of an extension order, except as otherwise provided in subdivision four of this section, written notice of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping, and of the fact that during such period communications were or were not intercepted, must be personally served upon the person named in the warrant and such other parties to the intercepted communications as the justice may determine in his discretion is in the interest of justice. The justice, upon the filing of a motion by any person served with such notice, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and warrants as the justice determines to be in the interest of justice.

4. On a showing of exigent circumstances to the issuing justice, the service of the notice required by subdivision three may be postponed by order of the justice for a reasonable period of time. Renewals of an order of postponement may be obtained on a new showing of exigent circumstances.

§ 823. Eavesdropping warrants; custody of warrants, applications and recordings.—1. Applications made and warrants issued under this title shall be sealed by the justice. Any eavesdropping warrant, together with a copy of papers upon which the application is based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A copy of such eavesdropping warrant, together with all the original papers upon which the application was based, shall be retained by the justice

issuing the same, and, in the event of the denial of an application for such an eavesdropping warrant, a copy of the papers upon which the application was based shall be retained by the justice denying the same. Such applications and warrants shall be disclosed only upon a showing of good cause before a court and shall not be destroyed except on order of the issuing or denying justice, and in any event shall be kept for ten years.

2. Custody of the recordings made pursuant to subdivision three of section eight hundred twenty shall be wherever the justice orders. They shall not be destroyed except upon an order of the justice who issued the warrant and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subdivisions one and two of section eight hundred twenty-five for investigations.

§ 824. Eavesdropping warrants; reports to the administrative office of the United States courts and the judicial conference.—1. Within thirty days after the termination of an eavesdropping warrant, or expiration of an extension order, or the denial of a warrant approving an emergency interception, the issuing or denying justice shall submit such report to the administrative office of the United States courts as is required by federal law. A duplicate copy of such report shall be forwarded to the judicial conference.

2. In January of each year, the attorney general and each district attorney shall submit such report to the administrative office of the United States courts as is required by federal law. A duplicate of such report shall be forwarded to the judicial conference.

§ 825. Eavesdropping warrants; disclosure and use of information; order of amendment.—1. Any law enforcement officer who, by any means authorized by this title, has obtained knowledge of the contents of any intercepted communication, or evidence derived therefrom, may disclose such contents to another law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

2. Any law enforcement officer who, by any means authorized by this title, has obtained knowledge of the contents of any intercepted communication, or evidence derived therefrom, may use such contents to the extent such use is appropriate to the proper performance of his official duties.

3. Any person who has received, by any means authorized by this title, any information concerning a communication, or evidence derived therefrom, intercepted in accordance with the provisions of this title may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court or in any grand jury proceeding; provided, however, that the presence of the seal provided for by subdivision two of section eight hundred twenty-two, or a satisfactory explanation of the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any communication or evidence derived therefrom.

4. When a law enforcement officer, while engaged in intercepting communications in the manner authorized by this title, intercepts a communication which was not other-

wise sought and which constitutes evidence of any crime that has been, is being or is about to be committed, the contents of such communications, and evidence derived therefrom, may be disclosed or used as provided in subdivisions one and two of this section. Such contents and any evidence derived therefrom may be used under subdivision three of this section when a justice amends the eavesdropping warrant to include such contents. The application for such amendment shall be made by the applicant as soon as practicable. If the justice finds that such contents were otherwise intercepted in accordance with the provisions of this title, he may grant the application.

18 U.S.C. §§ 2516-19

§ 2516. Authorization for interception of wire or oral communications.

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h),

or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping, and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses. (Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 216, and amended Pub. L. 91-452, title VIII, § 810, title IX, § 902(a), title XI, § 1103, Oct. 15, 1970, 84 Stat. 940, 947, 959; Pub. L. 91-644, title IV, § 16, Jan. 2, 1971, 84 Stat. 1891.)

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications.

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the ex-

tent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom

may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable. (Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 217, and amended Pub. L. 91-452, title IX, § 902(b), Oct. 15, 1970, 84 Stat. 947.)

§ 2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications

within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing

judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Dupli-

cate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may

move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted. (Added Pub. L. 90-351, title III,

§ 802, June 19, 1968, 82 Stat. 218, and amended Pub. L. 91-358, title II, § 211(b), July 29, 1970, 84 Stat. 654.)

§ 2519. Reports concerning intercepted wire or oral communications.

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney

of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such reports shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section. (Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 222.)

Order Denying Application for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventeenth day of May, one thousand nine hundred and seventy-three.

Present:

HON. HENRY J. FRIENDLY,
Chief Judge

HON. WALTER R. MANSFIELD,
HON. WILLIAM H. TIMBERS,
Circuit Judges

72-1957 & 72-1964

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

ARTHUR TORTORELLO, a/k/a ARTIE TODD; FRED HESSE, a/k/a FRED VON HESSE; MILTON H. PETERS; ARNOLD MCKINNEY; JOHN DENNETT; LOUIS KAYE; JERRY FIELDS; EDWARD ZUBER, and UNDERWRITERS INVESTMENT COMPANY,
Defendants,

ARTHUR TORTORELLO, a/k/a ARTIE TODD,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

Order Denying Application for Hearing in Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventeenth day of May, one thousand nine hundred and seventy-three.

72-1957 & 72-1964

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ARTHUR TORTORELLO, a/k/a ARTIE TODD; FRED HESSE, a/k/a FRED VON HESSE; MILTON H. PETERS; ARNOLD MCKINNEY; JOHN DENNETT; LOUIS KAYE; JERRY FIELDS; EDWARD ZUBER, and UNDERWRITERS INVESTMENT COMPANY,

Defendants,

ARTHUR TORTORELLO, a/k/a ARTIE TODD,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1703

ARTHUR TORTORELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner raises issues concerning the use against him of evidence obtained from court authorized oral and wire interceptions conducted pursuant to state and federal statutes. He claims that the use in evidence of recordings of conversations from the state interception, authorized to obtain evidence of state offenses, was illegal because federal agents participated in part of the interception. He also asserts that the state and federal electronic eavesdropping statutes are unconstitutional and challenges the interception on the basis of its duration and scope and the sufficiency of the showing of probable cause.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of the sale of unregistered securities in violation of 15 U.S.C. 77e(a)(1), (2); two

counts of fraud in violation of 15 U.S.C. 77q(a); one count of mail fraud in violation of 18 U.S.C. 1341; and one count of conspiring to commit the above offenses in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of five years' imprisonment on each count and fined $10,000. The court of appeals affirmed in a lengthy opinion (Pet. App. 1a-35a).

The evidence summarized by the court of appeals showed that petitioner and others participated in a scheme to sell worthless securities of a defunct Texas corporation which they had resurrected and whose assets they misrepresented (Pet. App. 3a-4a). The government's evidence at trial depended primarily on conversations obtained by wire and oral interceptions conducted by the New York District Attorney's office under a New York State court order, issued pursuant to the New York electronic interception statute (N.Y. Crim. Pro. L., Art. 700).[1] An original order and five extensions authorized interception for 149 days of wire communications on two telephones at petitioner's office ("Todd Associates") and the installation of overhearing devices on the premises for the same time. They were based on findings of probable cause that petitioner Tortorello and others were committing offenses involving burglary, forgery, grand larceny and other state offenses and conspiring to commit these offenses (Pet. App. 5a, 22a). It was also shown that petitioner was a "fence" for stolen property, particularly stolen securities (Pet. App. 22a).

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[1] The statute was adopted subsequent to the enactment of the federal statute, 18 U.S.C. 2510-2520 (Title III, Omnibus Crime Control and Safe Streets Act of 1968) and pursuant to the provisions of that statute (18 U.S.C. 2516(2)). It virtually tracks the language of the federal statue; the primary difference is the list of crimes for which interception orders may issue.

1. We rely on the opinions below for the answers to petitioner's claims concerning the duration and scope of the interception (Pet. App. 10a-11a, 21a-26a, 31a-35a, 55a); the sufficiency of the showing of probable cause (Pet. App. 13a-16a, 53a-55a); and the constitutionality of the state and federal statutes (Pet. App. 6a-13a).[2]

2. During the course of the state interception of "Todd Associates," state officers inadvertently overheard conversations regarding the stock fraud upon which this indictment was based. They notified federal officers who thereafter participated in the interception (Pet. App. 5a-6a). Petitioner claims that the interception must therefore be considered a federal interception, and that, since the crimes for which he was indicted and convicted are not listed in 18 U.S.C. 2516(1) as ones for which a federal electronic interception order may issue, the interception was illegal and the evidence derived therefrom should have been suppressed.

This claim is both untimely and without merit. It was raised for the first time in the court of appeals at oral argument, and that court did not decide it (Pet. 6). No reason is advanced for this untimeliness; this Court therefore should not consider the issue. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16.

Since the issue was not timely raised, no record was made to indicate the length or extent of participation by federal agents. But even if we assume *arguendo*

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[2] The cases supporting the constitutionality of the federal statute are collected at Pet. App. 12a-13a, n. 5. Certiorari was denied in *United States* v. *Whitaker*, 474 F. 2d 1246 (C.A. 3), on June 18, 1973 (Nos. 72-1317 and 72-1467).

that the interception may properly be characterized as a federal investigation under this Court's decisions in *Lustig* v. *United States*, 338 U.S. 74, and *Byars* v. *United States*, 273 U.S. 28, petitioner's claim that the evidence was illegally obtained and must be suppressed is without merit.

Petitioner bases his argument that the warrant was not issued in compliance with federal law on the erroneous contention that a federal warrant could not have been issued on the facts shown. But the affidavit submitted to the state court showed probable cause to believe that petitioner was engaged in interstate "fencing" of stolen goods and securities, which would constitute violations of 18 U.S.C. 2314 and 2315. These are offenses for which federal interception orders may issue.

Since the original interceptions were properly authorized, the initial interception of the conversations regarding the stock fraud by the state officers was also proper. Both the state and federal statutes specifically authorize the interception of communications concerning offenses not listed in the court order authorizing interception and their use in evidence. See, 18 U.S.C. 2517(5); N.Y. Code of Crim. P. §825.4 (now N. Y. Crim. Pro. L., Section 700.65).[3]

There was likewise no impropriety in the decision to share the information which was discovered concerning federal offenses with federal authorities. Such cooperation is specifically authorized by the federal statute. 18 U.S.C. 2517(1) provides for disclosure of information

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[3] However, since the securities fraud here constituted grand larceny under New York statutes, the interception of these communications by the state officers was in fact within the scope of their state court order (Pet. App. 27a-30a).

between law enforcement officers in the performance of their duties. In enacting this Section, Congress contemplated close cooperation between federal, state and local officers. S. Rep. No. 1097, 90th Cong., 2d Sess., 99. The only limitations the statute places on this sharing of information are that the disclosing officers must have obtained the information by means authorized by the statute and that the disclosure must be "appropriate to the proper performance of the official duties of the officer making or receiving the disclosure" (18 U.S.C. 2517(1)). There is no requirement that the information must relate to an offense designated in 18 U.S.C. 2516(1), nor is there any indication that such disclosure can be made only after termination of the interception. In this case, the state officers did intercept these conversations pursuant to a lawful authorization, and the disclosure was appropriate to the performance of the official duties of both the state officers in sharing the information[4] and the federal officers in their investigation of federal crimes. For the foregoing reasons, petitioner's analogy to the "silver platter doctrine" is inapt. The interception here by the state authorities was both lawful and constitutional. Nor is it open to question that disclosure of this lawfully obtained information to federal officers was authorized by the federal and state statutes. The fact that the disclosure was made at the time of the interception, rather than after the interception was completed,

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[4] Since the conversations were properly intercepted by the state officers searching for evidence of crimes against state statutes, there is nothing in the record to support the claim that this interception was conducted as a subterfuge to permit the federal officers to obtain otherwise unavailable evidence. Cf. *Abel* v. *United States*, 362 U.S. 217, 225-230.

makes no differnce in these circumstances. Cases cited by petitioner involving unlawful or unconstitutional searches by state officers are inapposite. So are the cases in which participation by federal officers in a state search rendered evidence inadmissible in a federal trial for failure to comply with the standards of Rule 41, Fed. R. Crim. P.

For the reasons stated above and in the opinions below, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.